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# Māori Traditional Knowledge and the Wai 262 Report: A Coherent Way Forward?

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### ABSTRACT

Twenty years after it was first filed, the Wai 262 report was finally handed to the New Zealand Government on 2 July 2011. Making recommendations on the place of Māori in New Zealand with respect to their cultural heritage, such as their traditional cultural expressions, traditional knowledge and guardianship role over these and fauna and flora, the report has the potential to change the future of New Zealand research practice, trade and intellectual property rights. This paper analyses the recommendations made in the report, focussing on the claims made over *taonga* species (treasured species, with guardians) and related *mātauranga Māori* (traditional knowledge). It further addresses whether the recommendations are internally coherent, create coherency between different areas of law and are consistent with New Zealand's international obligations. In doing so, it attempts to fill in details left out by the Tribunal.

### KEY WORDS

Wai 262, Māori cultural heritage, cultural intellectual property rights, traditional knowledge, mātauranga Māori.

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## 1. INTRODUCTION

Filed in 1991 by six *iwi* (tribes)<sup>1</sup> on behalf of all *tangata whenua* (people of the land),<sup>2</sup> the Wai 262 claim was one of the largest and most complex claims ever heard by the Waitangi Tribunal; a specialist court of inquiry, created to deal with issues relating to the Treaty of Waitangi,<sup>3</sup> the founding Treaty between the indigenous people of New Zealand (the Māori) and the British Crown. It is often referred to as the Māori claim over fauna and flora, but it is far more encompassing than this.<sup>4</sup> The Tribunal described it as being “about *mātauranga Māori* – the unique Māori way of viewing the world, incorporating both Māori culture and Māori traditional knowledge. It is no stretch to describe this claim as being about the survival of Māori culture and its ongoing place in this country.”<sup>5</sup> *Mātauranga Māori* can also be described as “traditional knowledge” (TK) in its broadest sense, including within it all aspects of intangible indigenous cultural heritage (ICH), whether technical or not.

The claim and the report are important because they challenge the right of the Crown to make decisions and set policies that will affect Māori interests in their culture. If taken heed by the Crown, it will affect the way that future governments set cultural policies, either with consultation or shared decision-making.<sup>6</sup> The report further has the potential to affect the substance of future intellectual property rights (IPRs) in New Zealand.<sup>7</sup> Being so broad and multifaceted, the Tribunal took twenty years to complete its report,<sup>8</sup> which was finally delivered to the New Zealand Government on 2 July 2011.

The first part of this paper briefly describes the role of the Waitangi Tribunal and of the Treaty of Waitangi in deciding the place and interests of Māori in New Zealand. It then outlines the relevant differences between the English and Māori texts of the Treaty and how the Tribunal dealt with this. The report itself differentiates between “*taonga* works” (treasured works) and “*taonga* species” (treasured species), and their respective *mātauranga Māori*, not because they are absolutely severable, but because there is a “natural division” between them.<sup>9</sup> This divide is similar to that which has been made

<sup>1</sup> Namely, Ngati Kuri, Ngati Wai, Te Rarawa, Ngati Porou, Ngati Kahungunu and Ngati Koata.

<sup>2</sup> Peter Dengate-Thrush, ‘Wai-262: New Zealand’s Indigenous Flora and Fauna Claim’ (1998) *New Zealand Intellectual Property Journal*, 1 (12), pp. 303-310, at p. 303. *Tangata whenua* is sometimes used synonymously as “indigenous people” and is often used by the Māori as a term to self-identify.

<sup>3</sup> Treaty of Waitangi Act 1975 (NZ).

<sup>4</sup> For a general overview of the claim, see New Zealand Ministry of Economic Development (NZ MED), ‘Issues Related to Biodiversity’ (8 December 2011), available at <http://www.med.govt.nz/sectors-industries/natural-resources/biodiscovery/issues-related-to-biodiscovery> (all online sources were accessed 25 January 2012).

<sup>5</sup> *Report of the Waitangi Tribunal on Claims Concerning New Zealand Law and Policy Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (2011) Wai 262, at p. 1 [hereinafter Wai 262].

<sup>6</sup> Daphne Zografos, ‘New Perspectives for the Protection of Traditional Cultural Expressions in New Zealand’ (2005) *International Review of Intellectual Property and Competition Law*, 36 (8), pp. 928-952, at pp. 935 [hereinafter Zografos, ‘New Perspectives for TCES in NZ’]; and Daphne Zografos, *Intellectual Property and Traditional Cultural Expressions*, Cheltenham, UK: Edward Elgar, 2010, at pp. 65-70 [hereinafter Zografos, *IP and TCES*].

<sup>7</sup> Zografos, ‘New Perspectives for TCES in NZ’, supra note 6, at pp. 935-936; and Zografos, *IP and TCES*, supra note 6, at pp. 65-70.

<sup>8</sup> The long length of time taken was also due to the great workload of the Tribunal and its limited funding; see Zografos, ‘New Perspectives for TCES in NZ’, supra note 6, at p. 935; and Maui Solomon, ‘Intellectual Property Rights and Indigenous Peoples Rights and Obligations’, *Workshop on Instruments for Access and Benefit Sharing from Genetic Resources and Related Traditional Knowledge Issues*, Global Biodiversity Forum 15, United Nations Environment Programme (Gigiri, Nairobi, Kenya, 12-14 May 2000), available at <http://www.inmotionmagazine.com/ra01/ms2.html> [hereinafter Solomon, ‘IPRs and Indigenous Peoples Rights and Obligations’].

<sup>9</sup> Wai 262, supra note 5, at p. 32.

by the World Intellectual Property Organization (WIPO) for TCEs and TK,<sup>10</sup> but is broader, as – in the WIPO context – TCE only includes the expression itself and not the underlying knowledge and TK has a narrowed meaning encompassing only technical knowledge. This discourse limits itself to *taonga* species and the related *mātauranga Māori* (i.e. TK), as *taonga* works have been dealt with elsewhere.<sup>11</sup> It, therefore, does not address *taonga* works (i.e. TCEs) and its related *mātauranga Māori*, which have been dealt with elsewhere.<sup>12</sup>

## 2. THE PLACE OF THE TREATY OF WAITANGI

Signed in 1840, the Treaty of Waitangi is the founding document of modern New Zealand and is a core part of its constitutional law. The history of the Treaty has been outlined elsewhere and need not be repeated here.<sup>13</sup> However, it is important to note that the Tribunal stated, in the Wai 262 report, that:<sup>14</sup>

New Zealand was founded on the relationship between these two [Māori and British] cultures. Meeting as equals, their representatives reached an agreement, in the Treaty of Waitangi, *that gave each of New Zealand's founding peoples a form of authority relevant to its culture*. The Crown won *kāwanatanga*, the right to enact laws and make policies; *iwi* and *hapū* [sub-tribes] retained *tino rangatiratanga* [the unqualified exercise of chieftainship] over their lands, settlements, and “*taonga katoa*”. In this way, *the Treaty provided a place for each culture in the life of this country*.

The Māori view the Treaty as the “main reference point for the recognition of respective roles, responsibilities and authority over cultural heritage, values and traditions.”<sup>15</sup> Similarly, the New Zealand Government has indicated that though it partakes in international negotiations relating to TCEs and TK, the issues that are considered in New Zealand are ultimately linked to the Treaty.<sup>16</sup>

<sup>10</sup> See WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Secretariat, ‘The Protection of Traditional Cultural Expressions: Draft Articles’, Nineteenth Session (WIPO Doc. WIPO/GRTKF/IC/19/4, 2011); and WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Secretariat, ‘The Protection of Traditional Knowledge: Draft Articles’, Nineteenth Session (WIPO Doc. WIPO/GRTKF/IC/19/5, 2011).

<sup>11</sup> Jessica C. Lai, ‘Māori Traditional Cultural Expressions and the Wai 262 Report: Looking at the Details’, *University of Lucerne, Switzerland*, i-call Working Paper No. 02 (2012).

<sup>12</sup> Jessica C. Lai, ‘The Future of Māori Cultural Heritage in New Zealand: Wai 262, *Taonga Works, Mātauranga Māori* and IPRs’, in Silja Bürgi and Annja Mannhart (eds), *Zukunft und Recht*, Zürich, Schulthess, 2012 (forthcoming).

<sup>13</sup> See Claudia Orange, *The Treaty of Waitangi*, Wellington, New Zealand: Bridget Williams Books Limited, 1987.

<sup>14</sup> Wai 262, *supra* note 5, at p. 14 (emphasis added).

<sup>15</sup> Huhana Smith, ‘A Comment on *The Politics of Māori Image and Design*’ (2003) *He Pukenga Kōrero*, 7 (1), pp. 38-41, at p. 41 [hereinafter Smith, ‘A Comment’].

<sup>16</sup> Delegation of New Zealand, ‘Specific Legislation for the Legal Protection of Traditional Cultural Expressions – Experiences and Perspectives of New Zealand’, in WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Secretariat, ‘Presentations on National and Regional Experiences with Specific Legislation for the Legal Protection of Traditional Cultural Expressions (Expressions of Folklore)’, (WIPO Doc. WIPO/GRTKF/IC/4/INF/2, 2002), annex II, at para. 41. See also Maui Solomon (for the NZ MED), ‘Peer Review Report on WIPO Documents: “The Protection of Traditional Cultural Expressions/Expression of Folklore: Revised Objectives and Principles” (WIPO/GRTKF/IC/8/4); and “The Protection of Traditional Knowledge: Revised Objectives and Principles (WIPO/GRTKF/IC/8/5)”’ (2005), at para. 3.38, appendix to: WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Secretariat, ‘The Protection of Traditional Cultural Expressions/Expression of Folklore: Table of Written Comments on Revised Objectives

The Waitangi Tribunal is a permanent commission of inquiry that assesses claims brought by Māori over alleged breaches of the Treaty of Waitangi by the Crown, whether through actions or omissions.<sup>17</sup> The Tribunal's role is advisory, such that its reports are not binding, but are recommendations to the Crown. Nevertheless, the role and influence of the Tribunal cannot be underestimated. As stated by one commentator, the recommendations of the Wai 262 report "are likely to herald an era in which Māori concerns over Mātauranga Māori and taonga enter a new level of public importance."<sup>18</sup> It is important to note that the role of the Tribunal is not to draft comprehensive legal solutions, but rather to provide directions to policymakers regarding the practical application of treaty principles and whether certain matters are inconsistent with those principles.<sup>19</sup> A meticulous analysis would have been beyond what the claimants asked for, which was more general.<sup>20</sup> This lack of detail is discussed throughout this paper and attempts are made to flesh out possibilities to fill in the gaps.

The Wai 262 claim related to Article 2 of the Treaty,<sup>21</sup> the English version of which states that the Crown:

confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; ...

There is also a Māori version of the Treaty, which was signed by about 240 Māori chiefs.<sup>22</sup> Both are official versions. As will be discussed further below, the English version confirms notions of Western property, using the terminology of exclusivity and undisturbed possession. In contrast, the Māori text, guarantees *tino rangatiratanga* over their lands, villages, and all their property and *taonga* (treasures). The concept of *tino rangatiratanga* is not en par with the Western concept of property, i.e. of exclusive ownership; rather, it is often considered to refer to autonomy, self-governance or authority, even self-determination, in the context of the Treaty.<sup>23</sup> *Taonga* is wide in meaning and includes material and non-material heirlooms and sacred places (*wahi*

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and Principles', Eleventh Session (WIPO Doc. WIPO/GRTKF/IC/11/4(b), 2007) [hereinafter Solomon, 'Peer Review Report'], who notes the importance of maintaining flexibility in international documents, so that New Zealand can tailor its solutions to the Treaty of Waitangi.

<sup>17</sup> The process taken by the Waitangi Tribunal for the Wai 262 claim has been outlined in Leo Watson and Maui Solomon, 'The Waitangi Tribunal and the Maori Claim to their Cultural and Intellectual Heritage Rights Property' (2000) *Cultural Survival*, 24 (4), available online at <http://www.culturalsurvival.org/ourpublications/csq/article/the-waitangi-tribunal-and-maori-claim-their-cultural-and-intellectual-he>.

<sup>18</sup> Earl Gray, 'Māori Culture and Trade Mark Law in New Zealand', in Christopher Heath and Anselm Kamperman Sanders (eds), *New Frontiers of Intellectual Property. IP and Cultural Heritage - Geographical Indicators - Enforcement - Overprotection*, Oxford and Portland, Oregon: Hart Publishing, 2005, pp. 71-96, at p. 93.

<sup>19</sup> See Treaty of Waitangi Act 1975 (NZ), preamble.

<sup>20</sup> Susy Frankel, 'A New Zealand Perspective on the Protection of Mātauranga Māori (Traditional Knowledge)', in Christoph B. Graber, Karolina Kuprecht and Jessica C. Lai (eds), *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues*, Cheltenham, UK: Edward Elgar, 2012 (forthcoming).

<sup>21</sup> For a summary of the claim in detail, see Dengate-Thrush, *supra* note 2.

<sup>22</sup> See Ministry for Culture and Heritage, 'Waitangi Treaty Copy', *New Zealand History Online* (2 February 2011) available at <http://www.nzhistory.net.nz/media/interactive/treaty-of-waitangi-copy>, citing Claudia Orange, *An Illustrated History of the Treaty of Waitangi*, 2nd edn, Wellington, New Zealand: Bridget Williams Books, 2004.

<sup>23</sup> Toon van Meijl, 'Māori Intellectual Property Rights and the Formation of Ethnic Boundaries' (2009) *International Journal of Cultural Property*, 16, pp. 341-355, at p. 344.

*tapu*), ancestral lore and genealogies (*whakapapa*).<sup>24</sup> Thus, it also encompasses *mātauranga Māori* (and so TK and TCE).<sup>25</sup> The New Zealand Court of Appeal has confirmed that the right to *tino rangatiratanga* must be actively protected by the Crown.<sup>26</sup> Therefore, the Crown has an active duty to ensure that Māori have self-governance over *mātauranga Māori*.

The Treaty of Waitangi created a partnership between the Māori and the Crown (including within it the concepts of reciprocity, good faith and reasonableness).<sup>27</sup> It gave the Crown *kāwanatanga*, or governance to enact laws and make policies. However, as confirmed by the Tribunal in the Wai 262 report, this right is not absolute.<sup>28</sup> Rather it is qualified by the promises made to the Māori therein, and “[l]ike any constitutional promise, those made in the Treaty cannot be set aside without agreement, except after careful consideration and as a last resort.”<sup>29</sup> Inherent in Article 2 is reciprocity, as the right to govern was given for the right of Māori to retain their full tribal authority and control over their lands, villages and *taonga*. In other words, the cessation of sovereignty to the Crown was conditional on the retention of *tino rangatiratanga*. Maui Solomon (a well-known Māori lawyer, who represented five of the six claimant *iwi*) noted that the Crown *kāwanatanga* and Māori *tino rangatiratanga* are “not in conflict but are indicative of the undertaking of mutual support, at the time [of the signing of the Treaty] and in the future.”<sup>30</sup>

Inherently, *tino rangatiratanga* is also not unqualified. Indeed, the Tribunal stated that, though Māori cultural heritage “must be protected to the greatest extent practicable”, the 170 years since the signing of the Treaty “socially, culturally, and economically swamped” the Māori, such that it is not possible that *tino rangatiratanga* over cultural heritage be absolute, as a matter of fact.<sup>31</sup> However, the Tribunal continued by stating that it should still be possible to deliver full authority over some *taonga*, when the interest is of such great import that other interests must be secondary, or when the “competing interests are not sufficiently important to outweigh the constitutionally protected *taonga* interest”.<sup>32</sup> When such full authority is not possible, “lesser” options may be, such as shared decision-making.<sup>33</sup> Finally, when shared decision-making is not possible, Māori should always have the ability to influence decisions relating to their *taonga*, such as through consultation. These findings are reflected in the recommendations made by the Tribunal for *taonga* species and the related *mātauranga Māori*, as will be discussed in this paper.

Under Wai 262, it was claimed that the Crown has failed to ensure Māori *tino rangatiratanga* due to the active dispossession of their lands, suppression of their culture and through neglect.<sup>34</sup> Furthermore, it was claimed that Article 2 of the Treaty has not been fulfilled because the balance between the Western worldview and *mātauranga*

<sup>24</sup> Waitangi Tribunal, ‘Treaty of Waitangi’, available at <http://www.waitangi-tribunal.govt.nz/treaty/>; and *Report of the Waitangi Tribunal on Te Roroa* (1992) Wai 38, at p. 210.

<sup>25</sup> Wai 262, *supra* note 5, at p. 15.

<sup>26</sup> *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 687 (CA).

<sup>27</sup> Watson and Solomon, *supra* note 17.

<sup>28</sup> See also Solomon, ‘Peer Review Report’, *supra* note 16, at para. 3.17.

<sup>29</sup> Wai 262, *supra* note 5, at p. 15.

<sup>30</sup> Solomon, ‘Peer Review Report’, *supra* note 16, at para. 3.17.

<sup>31</sup> Wai 262, *supra* note 5, at p. 16.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, at pp. 16-17.

<sup>34</sup> *Ibid.*, at p. 14. See also Paul Myburgh, ‘New Zealand / Aotearoa’, in Toshiyuki Kono (ed.), *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century*, Leiden and Boston: Martinus Nijhoff Publishers, 2010, pp. 639-662, at p. 660; and Watson and Solomon, *supra* note 17.

*Māori*, guaranteed therein, clearly favours the former, such that *mātauranga Māori* has been “marginalised to a point where its very survival is threatened.”<sup>35</sup> This is reflected in the fact that much *taonga* is controlled by the Crown, such as indigenous flora and fauna. Finally, the Crown has failed in its obligation through allowing third parties to own, control and use *taonga* or *mātauranga Māori*, even when they have no traditional claim to them.<sup>36</sup> As stated by Solomon: “In essence the Wai 262 claim seeks to give Māori the ability to define for themselves the parameters of their cultural and intellectual property rights and to control how those rights are developed.”<sup>37</sup>

As the Wai 262 claim was based on the guarantee to *tino rangatiratanga*, the report goes beyond merely looking at IP-related issues, but also has a constitutional and governance dimension. Much of the claim and the report dealt with rights to participate in the general exercise of government, such as in the development of all legislation, policy and international agreements affecting the ability of the claimant iwi to exercise authority over their *taonga*.<sup>38</sup> As will be discussed further below, that it is an issue of governance is important for considering questions of *ordre public*.

Finally, the Wai 262 report was the first Tribunal report to look to the future, rather than merely focusing on past grievances. As a result, the report is not limited to how previous and present Crown law and policy contravene the Treaty, but also discusses how the Treaty may be used as a platform for building the future of New Zealand. In doing so, it centralises the principle of partnership inherent in the Treaty and the idea of balancing the promises and rights of both parties. Moreover, it recognises that it is necessary to protect Māori culture and identity in order to protect New Zealand culture and identity,<sup>39</sup> stating that “[i]t is time for New Zealand law to reflect, and so for the world to learn, that these things belong to New Zealand and that they have kaitiaki [guardians].”<sup>40</sup>

### 3. THE PRINCIPLE OF KAITIAKITANGA VS THE PRINCIPLE OF “PROPERTY”

A core principle of *Tikanga Māori* (Māori customary law) is that of *kaitiakitanga*.<sup>41</sup> This is Māori stewardship or guardianship over their people, lands, villages and *taonga*. It is an obligation that arises from their kin relationship, not only to people, but also to things that are believed to have a kin relationship according to Māori myths, legends and belief systems. It can, thus, encompass land, waters, plants, wildlife and cultural works; and also intangible things such as language, identity, culture and *mātauranga Māori*. The obligation includes the care of both the physical and spiritual, requiring the nurturing of *mauri* (the life force). Those that have the *mana* (authority, power or supernatural force) to carry the responsibilities are called *kaitiaki*, which may be an individual, *whānau* (family), *hapū* or *iwi*. The *kaitiaki* are not only responsible for the *taonga* works, species or the *mātauranga Māori*, they are also entitled to the benefits of

<sup>35</sup> Wai 262, supra note 5, at p. 14.

<sup>36</sup> Ibid., at p. 15.

<sup>37</sup> Maui Solomon, ‘Maori Cultural and Intellectual Property Rights’, Speech Notes for Institute for International Research Conference (Auckland, 24-25 February 1997), at p. 6, cited in Gray, supra note 18, at p. 84.

<sup>38</sup> Delegation of New Zealand, supra note 16, annex II, at para. 40.

<sup>39</sup> Wai 262, supra note 5, at p. 98.

<sup>40</sup> Ibid., at p. 99.

<sup>41</sup> The description that follows is adapted from that given by the Tribunal; *ibid.*, at p. 17.



the cultural and spiritual sustenance therefrom. This can include the economic benefits, if the commercialisation is in accordance with *mātauranga Māori*.<sup>42</sup>

It is often argued that IP is incapable of fully meeting the interests of indigenous peoples in their cultural heritage because of the vast difference between the principles of *kaitiakitanga* and “property”.<sup>43</sup> As stated by Māori academic Hine Lord:<sup>44</sup>

Derived from the careful and deliberate transmission of Māori traditional knowledge, or *mātauranga Māori*, is one’s sense of identity and physical, mental and spiritual wellbeing ... To risk allowing this body of knowledge [*mātauranga Māori*] to be subjected to the forces of economic globalisation and intellectual property laws, devoid of any consideration of Māori cultural and spiritual values, would compromise the very essence of this knowledge base and, in the process, *Māori rangatiratanga*.

As such, “[t]he Wai 262 claim may be seen, at least in part, as a response to the tension between what are understood by Māori to be Article 2 rights and obligations, and the proprietary rights granted under intellectual property rights legislation”.<sup>45</sup> The Tribunal stated that the way forward is to “recognise that the guiding principles of *kaitiakitanga* on the one hand and property rights on the other are really different ways of thinking about the same issue – that is, the ways in which two cultures decide the rights and obligations of communities in their created works and valued resources.”<sup>46</sup> After all, “IP law and *tikanga Māori* share a common interest in the growth of culture and identity.”<sup>47</sup>

As pointed out above, the differences in the concepts are highlighted by the Treaty itself, the English version of which promises “full exclusive and undisturbed possession”, compared to the Māori version, which protects *tino rangatiratanga*. In other words, property vs *kaitiakitanga*. In its Wai 262 report, the Tribunal found that considering *mātauranga Māori* in terms of the English text did not make sense, because of the exclusive nature of the guarantee denoted therein. Though the exclusive rights are broad enough to guarantee IP-like rights in *taonga*, these were found to be too inflexible for *mātauranga Māori* and *taonga* works and the interests relating to *taonga* species, which cannot be held in such a way. The Tribunal stated:<sup>48</sup>

The language of exclusive rights is not apt for cultural knowledge or ideas – their boundaries are too elusive and they are in a constant state of change. Exclusive possession of *mātauranga Māori* in a modern context is impossible. Nor can any culture – Māori culture included – be exclusively possessed. These things are not like land or other physical resources. Nor are they like the fixed words and images of copyright and trade marks. They exist in the hearts and minds of the communities that created them. In fact, even if it were possible to grant exclusivity to a people’s cultural and intellectual tradition so that only they could have access

<sup>42</sup> Ibid., at p. 82.

<sup>43</sup> See, for example, Maui Solomon, ‘Understanding Indigenous Cultural and Intellectual Property Rights: Implications for Environmental Risk Management’, Environmental Risk Management Authority New Zealand 1998 Conference (New Zealand, 18 June 1998), available at <http://archive.ermanz.govt.nz/news-events/archives/events/erma-conf1998/maui-solomon.html> [hereinafter Solomon, ‘Understanding Indigenous CIPRs’].

<sup>44</sup> Hine Lord, ‘Tino Rangatiratanga and Trade Related Intellectual Property Rights’ (1999) *He Pukenga Kōrero*, 4 (2), pp. 34-48, at p. 39.

<sup>45</sup> NZ MED, *Review of the Patents Act 1953: Boundaries to Patentability*, Wellington, New Zealand: Regulatory and Competition Policy Branch, Ministry of Economic Development, 2002, at para. 88 [hereinafter NZ MED, *Review of the Patents Act 1953*].

<sup>46</sup> Wai 262, *supra* note 5, at p. 33.

<sup>47</sup> Ibid., at p. 46.

<sup>48</sup> Ibid., at p. 78.

to it, we think the act of doing so would be the death knell of that tradition. These things grow and evolve at the margins, in response to external stimuli. We saw that kind of cultural growth after Māori arrived in Aotearoa. And although British colonisation inflicted deep injuries on Māori society, the introduction of literacy, iron tools, and Christianity generated a wave of intellectual and artistic innovation that is still being felt today. Building a legal wall around mātauranga Māori would choke it.

The concerns the Māori have are often not over possession, but rather related to non-possessory rights, such as consultation or commercial exploitation.<sup>49</sup> In these cases, the guarantee endowed in the English version of the Treaty would be of little use, whereas that in the Māori version could be of service, as the Māori version of Article 2 better suits the concept of *kaitiakitanga*. It is, thus, more fitting to the particular concerns of the Māori, who (in most cases) do not seek exclusive possession and “ownership”, but rather retention of control to prevent misuse and ensure economic benefit is obtained when commercialisation is culturally appropriate.<sup>50</sup>

The Tribunal, thus, concluded that the question that they had to address was to what extent the guarantee of *tino rangatiratanga* should be used to offer a reasonable level of control to Māori over *mātauranga Māori*, *taonga* works and *taonga* species. Towards this, the *kaitiaki* relationship is key and is ultimately what should be protected. The analysis requires a case-by-case three-stage assessment of: (1) understanding the relationship between the *kaitiaki* and the particular *mātauranga Māori*, *taonga* work or *taonga* species; (2) identifying any other valid interests in the *mātauranga Māori*, *taonga* work or *taonga* species; and (3) balancing the other interests against those of the *kaitiaki*.<sup>51</sup> It was acknowledged that such an approach carries with it a level of uncertainty. However, it was considered important that there is the maximum amount of flexibility and the opportunity for “interest holders to explore ways in which all interests can be accommodated to the greatest extent possible”, because “a system like this, rather than a system of generalised solutions, will limit conflict and increase cooperation.”<sup>52</sup>

#### 4. IP, TAONGA SPECIES AND RELATED MĀTAURANGA MĀORI

*Taonga* species are treasured flora and fauna. *Mātauranga Māori* in the *taonga* species section of the report (and, thus, also in this analysis here in section 4) encompasses TK relating to *taonga* species and is of a more technical nature, though it is not necessarily limited to this. It has been well documented that the pursuit of science, knowledge and invention does not always lie easily with many indigenous worldviews, including that of the Māori.<sup>53</sup> Towards this, the Tribunal stated that it is “at odds” with *te ao Māori* (the

<sup>49</sup> Ibid., at p. 79.

<sup>50</sup> Ibid., at p. 78.

<sup>51</sup> Ibid., at p. 80. These three questions were set out for *taonga* works and their underlying *mātauranga Māori*, not for *taonga* species or the *mātauranga Māori* relating to biological resources. However, the analysis made by the Tribunal was nevertheless the same; see pp. 193-195.

<sup>52</sup> Ibid., at p. 80.

<sup>53</sup> For example, Zografos, ‘New Perspectives for TCES in NZ’, supra note 6, at p. 940; Erica-Irene Daes (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations), ‘Discrimination Against Indigenous Peoples. Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples’, (UN Doc. E/CN.4/Sub.2/1993/28, 1993), at para. 32; and Solomon, ‘IPRs and Indigenous Peoples Rights and Obligations’, supra note 8.

Māori worldview) for three reasons:<sup>54</sup> First, science prizes the advancement of knowledge “above other values”. Second, the empiric nature of science has no place for the non-physical world or that which cannot be tested. Third, science is generally reductive, in that it “seeks to understand each object or phenomenon in the physical universe by breaking it down into its component parts and identifying underlying properties or laws”, rather than “their relationship to other creatures within their particular environmental context.”<sup>55</sup>

The claimants had various concerns, which the Tribunal placed into four graduated (general) categories.<sup>56</sup> The first related to ownership of the *mātauranga Māori* in respect of *taonga* species, rather than the species themselves. The second category involved claims for protection of the *kaitiaki* relationship with *taonga* species. Thirdly, some claims were made that the *kaitiaki* relationship with *taonga* species is so strong that there should be ownership over the genetic materials of the species. At the highest level, with particularly special species, the *kaitiaki* relationship demands control over every living specimen of that species.

On the other hand, the Crown<sup>57</sup> submitted that landowners have the rights to access and exploit the fauna and flora on their land, and the Crown the sole right to wildlife as per the Wildlife Act 1953.<sup>58</sup> It rejected that the Māori should be consulted for the use of species that they felt a cultural association with. The Crown further opposed any system that would require prior informed consent (PIC) from *kaitiaki* for the research or exploitation of *taonga* species, unless the land upon which the fauna or flora lives is owned by the *kaitiaki*. The concept of access and benefit-sharing (ABS) agreements prior to researchers being allowed to exploit the biological materials was also rejected, as this would hamper research and would make New Zealand unattractive to international investors. The Crown, thus, argued that the recognition of Māori rights over *taonga* species would be economically unsound.

#### 4.1 TAONGA SPECIES

The Māori hold many species (both endemic and non-endemic to New Zealand)<sup>59</sup> as having *whakapapa* and *kaitiaki*. According to *te ao Māori*, all flora and fauna (mankind

<sup>54</sup> Wai 262, supra note 5, at p. 137.

<sup>55</sup> Māori academic Ocean Ripeka Mercier has described the Māori knowledge system as “culturalised, spiritualised, but [not] intellectualised”; compared to the Western knowledge system, which document all trial and error, experimentation and theory implementation, making the knowledge “intellectualised”. Importantly, Mercier notes that much Māori knowledge would have been developed through such trial and error, observation, hypothesis making and experimentation, but this was never recorded, making it not “intellectualised”, or at least seemingly so. See Ocean Ripeka Mercier, ‘Indigenous Knowledge and Science. A New Representation of the Interface Between Indigenous and Eurocentric ways of Knowing’ (2007) *He Pukenga Korero*, 8 (2), pp. 20-28, at pp. 22-23.

<sup>56</sup> The concerns of the claimants are summarised at Wai 262, supra note 5, at p. 144.

<sup>57</sup> The Crown’s arguments are summarised in *ibid.*, at pp. 146-147.

<sup>58</sup> The existing law on access to biological resources are discussed in the report in *ibid.*, at pp. 153-155. The ownership of natural resources by the government is of course objected by the Māori; see Solomon, ‘Peer Review Report’, supra note 16, at para. 8.2.

<sup>59</sup> Being endemic or not does not affect a species ability to be *taonga*. For example, the kumara is not endemic to New Zealand, but was brought to Aotearoa from Hawaiki in the canoes when the Māori first arrived. Before Polynesia, kumara came from South America. However, because they came over with the canoes, their status as *taonga* is even greater. See Wai 262, supra note 5, at p. 135.

included) are connected to the Māori gods and, thus, all share *whakapapa*.<sup>60</sup> Indeed, “biodiversity” is often described as *nga mokopuna of Papatuanuku raua ko Ranginui*, which means “the descendants of the Earth Mother and Sky Father”.<sup>61</sup> Many particular species carry with them stories, often related to the gods or to Māori ancestors; they have *kōrero* (a story).<sup>62</sup> They also have *mātauranga Māori* associated with them.<sup>63</sup> These species have *kaitiaki* and are *taonga*. These *kaitiaki* interests deserve positive protection, as promised in the Treaty of Waitangi via the Article 2 right to *tino rangatiratanga* over *taonga* (discussed above, sections 2 and 3).<sup>64</sup>

The concerns that the Māori have are generally related to the bestowment of IPRs (such as through patents or plant variety rights (PVRs))<sup>65</sup> to third parties over biological resources (including genetic materials), which can affect the *kaitiaki* relationship to *taonga* species. It has also been argued that allowing such patents and PVRs encourages research in genetic modification (GM), which many Māori are against.<sup>66</sup> Even when new species are created via traditional cross breeding techniques, rather than genetic engineering, there are concerns that the new strains of *taonga* species pose a risk to the relationship between the *kaitiaki* and *taonga* species.

Issues pertaining to *taonga* species are broad and not only related to IPRs. Thus, the Tribunal also considered bioprospecting and the existing formal processes that researchers must satisfy to commence research on GM, in New Zealand. This is because the Tribunal saw these different aspects of the research process as interrelated and inseparable; at least not in so far as Māori concerns should be coherently analysed, as they are all relevant to the *kaitiaki* relationship. Thus, the Tribunal assessed the concern of many Māori that bioprospecting, which is currently unregulated in New Zealand,<sup>67</sup> without proper consultation and consent undermines *kaitiakitanga*. Furthermore, it addressed the claim that the processes in place to perform research relating to *taonga*

<sup>60</sup> Nic Paget-Clarke (interviewer), Interview with Maui Solomon (12 and 15 March 2001), ‘The Wai 262 Claim by Six Maori Tribes. Flora and Fauna and Cultural and Intellectual Heritage Rights’ (2001) *In Motion Magazine*, available online at <http://www.inmotionmagazine.com/nztrip/ms1.html#Anchor-The-38149>.

<sup>61</sup> Aroha Mead, ‘Indigenous Rights to Land and Biological Resources. The Convention on Biological Diversity’, *Biodiversity: Impacts on Government Business and the Economy*, International Institute for Research (NZ) Ltd and Department of Conservation (Auckland, New Zealand, 4-5 August 1994), at p. 8, collected in Aroha Mead, *Nga Tikanga, Nga Taonga. Cultural and Intellectual Property : The Rights of Indigenous Peoples*, Auckland, New Zealand: International Research Institute for Māori and Indigenous Education, 1994, pp. 4-15 [hereinafter Mead, ‘Indigenous Rights to Land and Biological Resources’].

<sup>62</sup> Wai 262, supra note 5, at pp. 114-115.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid., at pp. 192-194. In the Wai 262 claim, the Crown did attempt to deny that species and genetic information could be *taonga* for the purposes of the Treaty, as genetic resources were not known of in 1840. However, this contention was weakly made and not taken seriously by the Tribunal. It was already an established principle that what falls within the purview of the Treaty is not static, but dynamic (at p. 193).

<sup>65</sup> See NZ MED, *Review of the Patents Act 1953*, supra note 45, at paras 75-80; and NZ MED, *Review of the Plant Variety Rights Act 1987. A Discussion Paper*, Wellington, New Zealand: Ministry of Economic Development, 2002, at paras 99-101 [hereinafter NZ MED, *Review of the Plant Variety Rights Act 1987*].

<sup>66</sup> See NZ MED, *Review of the Patents Act 1953*, supra note 45, at paras 77 and 93; Nic Paget-Clarke (interviewer), Interview with Sydney Jackson (5 March 2001), ‘Undisturbed and Exclusive Possession of the Land, Estates and Forests. The Strength in It’ (2001) *In Motion Magazine* (5 March 2001), available at <http://www.inmotionmagazine.com/nztrip/sj1.html>; Solomon, ‘IPRs and Indigenous Peoples Rights and Obligations’, supra note 8; and Lord, supra note 44, at p. 40. That there is no single perspective is discussed by Mere Roberts, ‘Consultation Concerning Novel Biotechnologies: Who Speaks for Māori’ (2009) *International Social Science Journal*, 60 (195), pp. 145-151, at pp. 148-149, who notes that genes are considered *taonga* because they have been inherited from ancestors, are part of their *whakapapa*, and are only held under custodianship for future generations. However, because the Māori believe that all things are descended from the same *atua* and all related, the more pertinent issue is survival and GM is, thus, acceptable.

<sup>67</sup> The law in New Zealand regulating bioprospecting is discussed in Wai 262, supra note 5, at pp. 144-158.

species could also have the same effect.<sup>68</sup> This is discussed in more detail below (sections 4.3.1 and 4.3.2).

Claims that would bestow rights similar or equivalent to property rights over *taonga* species *per se* were more controversial than those over the TK that the Māori may have relating to biological resources. While many interested parties seemed open to recognising a Māori interest in TK, they were against the prospect of Māori having rights over species themselves.<sup>69</sup> However, this does not mean that parties were not open to consultation and working together with Māori, but were hesitant to have hard law requiring PIC and ABS, as it would stifle research and would not allow for parties to come to their own agreements.

The Tribunal found the exclusive ownership of the genetic or biological resources of *taonga* species inappropriate.<sup>70</sup> The Māori did not create *taonga* species.<sup>71</sup> What is more important to assess is the *kaitiaki* relationship (as per the guarantee to *tino rangatiratanga* in the Māori text of the Treaty), on a case-by-case basis.<sup>72</sup> The greater the effect of the bioprospecting, GM or IPRs on the *kaitiaki* relationship, the greater the right of involvement in decision-making.<sup>73</sup>

## 4.2 MĀTAURANGA MĀORI IN TAONGA SPECIES

For the purposes of *mātauranga Māori* in *taonga* species, the Tribunal found the WIPO definition of TK fitting:<sup>74</sup>

[TK is the] content or substance of knowledge resulting from intellectual activity in a traditional context, [including] the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.

As stated above, *mātauranga Māori* is also *taonga* and so also warrants positive protection from the Crown as a Treaty obligation (see sections 2 and 3).<sup>75</sup> Indeed, as it is something actually created by the Māori, it is easier to accept the desire for a continued interest.<sup>76</sup> The concerns that were expressed by the claimants in the Wai 262 report over

<sup>68</sup> The law in New Zealand regulating genetic modification is discussed in *ibid.*, at pp. 158-169.

<sup>69</sup> *Ibid.*, at pp. 181-189.

<sup>70</sup> *Ibid.*, at p. 192.

<sup>71</sup> *Ibid.*, at p. 193.

<sup>72</sup> *Ibid.*, at pp. 193-194.

<sup>73</sup> *Ibid.*, at p. 194.

<sup>74</sup> *Ibid.*, at pp. 204-205. The Tribunal cited the definition given in the 2006 provisions for TK. By May 2011 (just before the release of the Wai 262 report), the draft articles contained three alternative definitions. However, the definition cited by the Tribunal remained the same in the Glossary of key terms released by WIPO. See, respectively, WIPO, 'Revised Provisions for the Protection of Traditional Knowledge. Policy Objectives and Core Principles', annexed to: WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), Secretariat, 'The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles', Seventeenth Session (WIPO Doc. WIPO/GRTKF/IC/9/5, 2006), at p. 19; WIPO, IGC, Secretariat, 'The Protection of Traditional Knowledge: Draft Articles', Nineteenth Session (WIPO Doc. WIPO/GRTKF/IC/19/5, 2011), annex, at p. 1; and WIPO, IGC, Secretariat, 'Glossary of Key Terms Related to Intellectual Property and Traditional Knowledge', Nineteenth Session (WIPO Doc. WIPO/GRTKF/IC/19/INF/8, 2011), annex, at p. 23.

<sup>75</sup> Wai 262, *supra* note 5, at pp. 194-195.

<sup>76</sup> *Ibid.*, at p. 194.

their *mātauranga Māori* being taken, adapted and patented are by no means confined to the Māori. Rather, they are shared by most indigenous peoples around the world and many traditional communities.

The interests that the Māori seek are generally related to:<sup>77</sup> (1) acknowledgement as the traditional knowledge holders; (2) respect for the Māori values relating to the knowledge (protecting *kaitiakitanga*); (3) consultation and PIC to use, develop or commercialise the TK or a development thereof; (4) participation in the research process to ensure continued respect for Māori values and *kaitiakitanga*; and (5) the sharing of any benefits that accrue from their TK.

The Tribunal found that any exclusive ownership to *mātauranga Māori* already in the public domain was not possible.<sup>78</sup> What is in the public domain cannot be “unknown”.<sup>79</sup> The more relevant concept is the *kaitiaki* relationship guaranteed in the Māori text of the Treaty of Waitangi. It was concluded that when there is commercial exploitation, there are three “amply justified” rights.<sup>80</sup> The first is the right to be acknowledged as the *kaitiaki*. The second is the right to have a “reasonable degree of control” over use. Finally, any commercial use of *mātauranga Māori* relating to *taonga* species must give “proper recognition” (dependent on the circumstances) to the interests of the *kaitiaki*. Because of the different *kaitiaki* relationships, “proper recognition” can vary between requiring consent, on the one hand, and disclosure or consultation, on the other. The correct approach is dependent on a case-by-case balancing of the *kaitiaki* relationship (what is required to keep it healthy) against the interests of researchers, the public good of furthering research, development and commerce, or of IPR holders or applicants.<sup>81</sup>

#### 4.3 THE TRIBUNAL’S RECOMMENDATIONS AND PROPOSED REFORMS

The Tribunal did not assess the claims in terms of *taonga* species or technical *mātauranga Māori* separately, but rather saw them as too interconnected to do so. In doing this, it stated (with regard to the four levels of claims made) that whether *kaitiaki* have any rights depends on the relationship between the *kaitiaki* and the relevant TK or *taonga* species.<sup>82</sup> This is the case whether addressing issues relating to bioprospecting, GM, or IPRs in genetic materials.<sup>83</sup> Thus, the “core question in this entire debate: is there a case for greater protection of *kaitiaki* interest than the status quo, or do the current regimes strike an appropriate balance in their particular contexts?”<sup>84</sup>

It was concluded that the law covering aspects of bioprospecting is incoherent and even confusing.<sup>85</sup> As it is, it does not protect the *kaitiakitanga* in *taonga* species. It is in the interest of all stakeholders to “establish a robust and transparent policy around Māori involvement in bioprospecting.”<sup>86</sup> With regard to GM, patenting and plant varieties, the Tribunal found that the existing law and policy do not protect the *kaitiaki* interests in

<sup>77</sup> Ibid., at pp. 144-145 and 178-179. For a discussion on bioprospecting and the commercial use of Māori TK, see also Solomon, ‘Understanding Indigenous CIPRs’, supra note 43.

<sup>78</sup> Wai 262, supra note 5, at pp. 194-195.

<sup>79</sup> This finding was consistent with that for *taonga* works and the underlying *mātauranga Māori*; *ibid.*, at p. 79.

<sup>80</sup> Ibid., at p. 195.

<sup>81</sup> Ibid., at pp. 195-197.

<sup>82</sup> Ibid., at p. 157.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid., at p. 189.

<sup>85</sup> Ibid., at p. 158.

<sup>86</sup> Ibid.

the genetic and biological resources of *taonga* species, nor in the *mātauranga Māori* related thereto.<sup>87</sup> This finding came as no surprise to the Tribunal, because each of the specified areas of law was developed to further research and commerce.<sup>88</sup> Thus, Māori interests were either not taken into account or were only something peripheral to consider.<sup>89</sup>

### 4.3.1 Bioprospecting

For laws and policies on bioprospecting, the Tribunal recommended that the Department of Conservation (DOC),<sup>90</sup> in consultation with the Māori, develop a single regime that is Treaty compliant.<sup>91</sup> The legislation setting up DOC is unusual in that it requires that the Act be “interpreted and administered as to give effect to the principles of the Treaty of Waitangi”.<sup>92</sup> Thus, one of the six director-generals of DOC is in charge of the “Kaupapa Atawhai Group”, which has the responsibility to maintain this requirement.<sup>93</sup> Furthermore, DOC already has in place the use of “pātaka komiti”, which are panels made up of local *iwi* that have certain limited responsibilities in considering applications for access to and harvest of *taonga* species within a particular conservancy or geographic area.<sup>94</sup>

The Tribunal recommended that the pātaka komiti be given a greater role, including for applications for bioprospecting.<sup>95</sup> It was also suggested that the role be more than advisory, but one of joint decision-making at the regional level.<sup>96</sup> It would be expected that they develop guidelines and protocols to streamline the application process. PIC and ABS should not be required for every application for bioprospecting, as this would presume that there would be an interference with a *kaitiaki* relationship with a *taonga* species.<sup>97</sup>

In making this recommendation, the Tribunal struck an interesting balance between the interests of researchers and that of the *kaitiaki*. The shared decision-making at the regional level is particularly interesting because the Tribunal was satisfied with an advisory role for all of the other Māori bodies/committees discussed in relation of *taonga* species and its connected *mātauranga Māori* (as outlined further below). It is not clear from the report why this one-off difference was recommended, but it is most likely a consequence of the regional nature of the pātaka komiti, as opposed to the national nature of the other recommended Māori bodies. It is understandable that the Māori be given a greater right at the regional level, wherein they are more likely to have a better feel for the local situation.

It is likely that the claimants were disappointed with the finding that PIC and ABS should not be compulsory. However, the refrain from a blanket requirement of PIC and

<sup>87</sup> Ibid., at pp. 190-192.

<sup>88</sup> Ibid., at p. 192.

<sup>89</sup> Ibid.

<sup>90</sup> Established by the Conservation Act 1987 (NZ), s. 5.

<sup>91</sup> Wai 262, supra note 5, at p. 198.

<sup>92</sup> Conservation Act 1987 (NZ), s. 4. Maui Solomon has stated that the New Zealand courts have applied a minimalist interpretation of this section; Solomon, ‘IPRs and Indigenous Peoples Rights and Obligations’, supra note 8.

<sup>93</sup> See DOC, ‘Kapupapa Atawhai Role’, available at <http://www.doc.govt.nz/about-doc/role/maori/kaupapa-atawhai-role/>.

<sup>94</sup> Wai 262, supra note 5, at p. 154.

<sup>95</sup> Ibid., at p. 198.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid., at p. 199.

ABS is necessary to prevent research and development from being hindered. Moreover, it is essential to reflect that the rights are justified through Treaty Article 2 *tinō rangatiratanga* over *taonga*, which is represented in the concept of *kaitiakitanga*. Put another way, no automatic requirement of PIC and ABS ensures that the right provided does not exceed its justification, namely of protecting the *kaitiaki* relationship with *taonga* species.

### 4.3.2 GM Research Applications

In New Zealand, any GM must first be given the green light by the Environmental Protection Authority (EPA), formerly the Environmental Risk Management Authority (ERMA).<sup>98</sup> ERMA policy required that anyone wanting to undertake such research consult first with Māori; the extent of the consultation expected depended on the type of research and the level of risk.<sup>99</sup> The Tribunal recommended that Māori be given a greater role in deciding whether applications to undertake GM research pose a risk. Currently, risk is defined as physical risks, which makes the assessment heavily scientifically based. The Wai 262 report recommended that the assessment of risk for application for GM not be purely scientific, but take into account non-physical concerns, such as those held by *kaitiaki*. The Authority also currently has an statutorily required Māori Advisory Committee, Ngā Kaihautū (4-8 persons)<sup>100</sup> that the Tribunal recommended should remain an advisory committee, but should be able to appoint two members to the Authority itself to ensure the Māori voice in the final decision taken.

It is interesting that the Tribunal recommended both the continuance of the advisory body and the placement of two of its members into the Authority proper. The recommendation essentially means that there is a consultative role and another of shared decision-making. Having both is unusual, but is likely due to the additional recommendation that the Authority take into account non-physical concerns. There is a perceivable problem in how to balance non-physical interests in scientific decisions.<sup>101</sup> There has been criticism in including spirituality in environmental legislation at all, and, in balances between Māori spirituality and other concerns, the latter have dominated to date.<sup>102</sup> Solomon has stated that legislative requirements to take into account of the Māori view or the Treaty of Waitangi are a “tokenism”, as these are often taken as the least important aspects to consider.<sup>103</sup> The issue is not only related to the question of

<sup>98</sup> See *ibid.*, at pp. 199-200. The EPA came into existence on 1 July 2011, the day before the release of the Wai 262 report. The report makes reference to the “Authority” as the decision-making body, which is now called the “Board”. To save from confusion, this paper uses the term “Authority”. Furthermore, this new Authority now oversees the Hazardous Substances and New Organisms Act 1996.

<sup>99</sup> Roberts, *supra* note 66, at pp. 145-146.

<sup>100</sup> Environmental Protection Authority Act 2011 (NZ), ss 18-21. This Advisory Committee also advises the Authority for the purposes of the Hazardous Substances and New Organisms Act 1996.

<sup>101</sup> That the ERMA Authority was unable to do so, regarding Māori concerns relating to GM, was discussed by Maui Solomon; Nic Paget-Clarke (interviewer), Interview with Maui Solomon (12 and 15 March 2001), *supra* note 60.

<sup>102</sup> New Zealand Human Rights Commission, ‘Human Rights in New Zealand / Ngā Tika Tangata O Aotearoa’, Report (2010), at p. 148, available online at [http://www.hrc.co.nz/hrc\\_new/hrc/cms/files/documents/Human\\_Rights\\_Review\\_2010\\_Full.pdf](http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/Human_Rights_Review_2010_Full.pdf).

<sup>103</sup> Solomon, ‘Understanding Indigenous CIPRs’, *supra* note 43, in relation to the ERMA, the Hazardous Substances and New Organisms Act 1996 and Resource Management Act (RMA) 1991. See also Lord, *supra* note 44, at p. 36, who stated that the processes established to recognise Māori Treaty rights (in the Conservation Act 1987, RMA 1991 and Treaty of Waitangi State Enterprise Act 1988) “are more often confined by the interpretive and conceptual skills of those operating at the level of implementation”; and Huhana



how much weight should be given to such concerns, but also of how one is even meant to reconcile the physical with the non-physical. This is especially complicated for trained scientists with little knowledge or understanding of the metaphysical aspects of *te ao Māori*.<sup>104</sup> This difficulty makes the Advisory Committee of little use, unless there are also representatives within the Authority to assist in determining how to use the advice from the Committee in achieving the correct balance, thus giving Māori a “meaningful opportunity for expression”, as demanded by Solomon.<sup>105</sup>

Currently, the Authority is composed of 6-8 persons, one of whom must have “knowledge and experience relating to the Treaty of Waitangi and tikanga Māori”.<sup>106</sup> It would seem that it was the Tribunal’s recommendation that two additional persons be placed into the Authority, thus placing 3 representatives of Māori interests into the Authority. This is because the role of the members of Ngā Kaihautū is different, being that they “provide advice and assistance to the [Authority] on matters relating to policy, process, and decisions”,<sup>107</sup> “from the Māori perspective and ... within the terms of reference of the committee as set by the EPA”.<sup>108</sup> The mentioned terms of reference refer to addressing “Māori concerns and interests”,<sup>109</sup> “to act at all times to protect and uphold the integrity of tikanga and mātauranga Māori and to monitor their application by the EPA in undertaking its functions”,<sup>110</sup> and “account of Māori perspectives including tikanga Māori, the Tiriti o Waitangi/Treaty of Waitangi, economic, scientific and other Māori aspirations”.<sup>111</sup> This is potentially broader than issues relating to the Treaty and *taonga* species.

It is unclear whether the two additional members would take the place of other members, or mean that the number of the Authority would increase to 8-10. If the former, this would result in the Māori interest being accounted for in 3 out of 6-8 persons; a very high proportion. If the latter, 3 out of 8-10 of the Authority would address Māori concerns, which is nevertheless not a poor showing.

Whether Ngā Kaihautū would be able to replace the two persons with another two is also unclear. In other words, would its numbers be raised to 6-10 members to account for the two lost? Under the existing legislation, Ngā Kaihautū may not have any members from the Authority.<sup>112</sup> This implies that a dual role in both the Advisory Committee and the Authority is not acceptable. Thus, it could be presumed that Ngā Kaihautū would retain 4-8 members and its two appointed members would be lost to them.

Finally, it was suggested that Ngā Kaihautū be able to give advice when it perceives a Māori interest and not only when requested by the Authority. This is actually already the case under the most recent terms of references that the Authority has set for 2011-

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Smith, ‘International Perspectives and the Protection of Maori Cultural Heritage in Aotearoa’ (1999) *He Pukenga Korero*, 4 (2), pp. 49-58, at pp. 54-56, regarding the RMA 1991 and Historic Places Act 1993.

<sup>104</sup> As Aroha Mead has noted, in New Zealand, there are still debates about whether Māori knowledge is in fact scientific and scientists, academics and corporate professionals will need to be “de-programmed” in order to work with indigenous peoples and their communities in a “very direct and active way”. Mead goes so far as to call this “racist”. See Mead, ‘Indigenous Rights to Land and Biological Resources’, *supra* note 61, at pp. 2-3.

<sup>105</sup> Solomon, ‘Understanding Indigenous CIPRs’, *supra* note 43.

<sup>106</sup> Environmental Protection Authority Act 2011 (NZ), s. 9.

<sup>107</sup> Environmental Protection Authority Act 2011 (NZ), s. 19(1).

<sup>108</sup> Environmental Protection Authority Act 2011 (NZ), s. 19(2).

<sup>109</sup> Māori Advisory Committee – Ngā Kaihautū Tikanga Taiao Terms of Reference 2011- 2014, cl. 3.1.

<sup>110</sup> Māori Advisory Committee – Ngā Kaihautū Tikanga Taiao Terms of Reference 2011- 2014, cl. 4.2.

<sup>111</sup> Māori Advisory Committee – Ngā Kaihautū Tikanga Taiao Terms of Reference 2011-2014, cl. 4.3.a.

<sup>112</sup> Environmental Protection Authority Act 2011 (NZ), s. 18(3).

2014,<sup>113</sup> which allows Ngā Kaihautū to bring any concerns to the Authority whenever it sits, the policy requiring open communication.<sup>114</sup>

### 4.3.3 Patent Law

As to IPRs over *taonga* species and connected *mātauranga Māori*, the Tribunal found fault with the Māori Patents Advisory Committee that has been proposed in the Patents Bill 2008, many of the problems of which have been discussed elsewhere.<sup>115</sup> To reiterate, the Bill would have that a Māori Patents Advisory Committee be formed to advise the Commissioner of Patents in his/her decision of whether the “commercial exploitation” of an alleged invention would be contrary to morality or *ordre public*. Specifically, it would advise on whether an alleged invention is derived from Māori TK or “indigenous plants or animals” and, if so, whether “the commercial exploitation of that invention is likely to be contrary to Māori values”.<sup>116</sup>

Though the Tribunal liked that *ordre public* would be a ground for application rejection, as well as morality (which was already possible),<sup>117</sup> the Tribunal made the following recommendations: First, the Committee should also be able to advise the Commissioner on the requirements of patentability, for example, on whether there is novelty and an inventive step.<sup>118</sup> This would essentially mean that the “contrary to Māori values” aspect of the test currently in the Bill would not be of primary relevance for alleged inventions derived from *mātauranga Māori*. It would seem, however, that it would still be relevant for alleged inventions derived from “indigenous” species, over which concerns of novelty, obviousness and utility are not inherently related.

This recommendation makes sense, as if there is derivation from *mātauranga Māori*, the question of whether the commercial exploitation of the invention would be contrary to Māori values is of secondary relevance. The primary point is that the derivation may mean that there is no novelty or inventive step. If there is novelty and non-obviousness, the derivation from *mātauranga Māori* may mean that the Commissioner may, nevertheless and secondarily, want to recommend that the patent applicant consult with the relevant *kaitiaki* regarding the appropriateness of the application, consent and possible ABS. On the other hand, that an alleged invention is derived from a *taonga* species does not necessarily or inherently affect novelty or obviousness. However, the derivation may be contrary to the *kaitiaki* interests and, thus, “Māori values”, justifying a rejection on the grounds of morality or *ordre public*. For a schematic form of how Wai 262 and the Patents Bill could be made coherent with each other, see the Appendix.

Though the Wai 262 report deals with *taonga* species, the Bill addresses “indigenous plants or animals”. “Indigenous” is not defined in the Bill. These two terms are conceivably different in meaning. Being “*taonga*” requires a *kaitiaki* relationship, whereas being “indigenous” in general parlance merely means coming from New Zealand. This difference was not addressed by the Tribunal. Arguably, it should have been. The scope of the Bill is wider than what the Tribunal deemed to be justifiably protectable, i.e. the *kaitiaki* relationship. Giving Māori rights over fauna and flora that

<sup>113</sup> The terms of reference must be reviewed at least every three years by the Authority in conjunction with Ngā Kaihautū; Māori Advisory Committee – Ngā Kaihautū Tikanga Taiao Terms of Reference 2011-2014, cl. 5.1.

<sup>114</sup> Māori Advisory Committee – Ngā Kaihautū Tikanga Taiao Terms of Reference 2011-2014, cl. 3.4 and 3.5.

<sup>115</sup> Jessica C. Lai, ‘Māori Culture in the Modern World: Its Creation, Appropriation and Trade’, *University of Lucerne, Switzerland*, i-call Working Paper No. 02 (2010), at pp. 21-22.

<sup>116</sup> Patents Bill (As Reported from the Commerce Committee) 2010 (NZ), cls 275-278.

<sup>117</sup> Wai 262, supra note 5, at p. 202.

<sup>118</sup> *Ibid.*, at p. 201.

are not *taonga* and for which there is no *kaitiaki* relationship goes beyond the guarantee given in Article 2 of the Treaty of Waitangi. It is perceivable that an application for an alleged invention, derived from GM of an indigenous (but not *taonga*) plant could be sent to the Committee, whereupon it could be found to be contrary to “Māori values” purely because of the GM aspect of the invention and not because of any *kaitiaki* relationship. For the Patents Bill to be consistent with the Tribunal’s findings as to scope of right, the author recommends that the term “indigenous plants or animals” be replaced with “*taonga* species”. If this does not occur, the Intellectual Property Office of New Zealand (IPONZ) should develop policy and practice guidelines (possibly with the Māori Patents Advisory Committee) narrowing the definition of “indigenous” to that which is *taonga*.

As alluded to, the same issue lies in the Bill’s use of the term “Māori values”, which is wider than the *kaitiaki* interest. The Tribunal did not address whether it is problematic that the role of the Advisory Committee under the Bill is wider than that which they conclude is justifiable subject matter to protect. One could argue that it is not problematic, as the Bill allows for patent application rejection on the grounds of *ordre public* and morality, generally, not just as narrowly defined by the Tribunal. Thus, the Committee may be expected to advise the Commissioner on Māori concerns greater than those relating to the *kaitiaki* relationship (such as for GM inventions not derived from *taonga* species). On the other hand, one wonders what justifies the wider scope of right given only to the Māori, if not the Treaty. It would be different if the role of the Committee were to advise the Commissioner on morality and *ordre public* generally from a Māori perspective. As they make up a significant section of society, consultation makes sense from a democratic stand point. However, the role of the Committee is specifically targeted towards the use of *mātauranga Māori* and indigenous fauna and flora, the rights to which the Tribunal defined as being confined to the *kaitiaki* relationship. Of course, the Crown is fully within its rights to give more to the Māori than guaranteed by the Treaty, but in doing so it must remember that in the Treaty was a *quid pro quo* and Māori interests always have to be balanced against the interests of others. Given that many patent applications can be controversial generally, even among non-Māori, such as with biotech- and GM-related inventions, it seems inappropriate to give Māori a special advisory role outside of the Treaty-guaranteed *kaitiaki* relationship. Therefore, the author here suggests that the Bill be amended to reflect that the particular “Māori values” of interest are those relating to the *kaitiaki* relationship.

The second recommendation made by the Tribunal was that the Committee must be able to advise the Commissioner on any existing and conflicting *kaitiaki* interests, even if the requirements to patentability are satisfied.<sup>119</sup> This seems an odd suggestion, as it would appear that the Bill already allows for this through the exception to patentability on the grounds of *ordre public* and morality. Exceptions from patentability are by definition used to not allow the registration of inventions that satisfy the basic requirements of patentability. The recommendation, thus, seems superfluous. What would be more prudent to point out would be that *kaitiakitanga* over *taonga* is guaranteed through *tino rangatiratanga* in Article 2 of the Treaty of Waitangi and, as the Treaty is a central part of the New Zealand legal and social structure, maintaining this guarantee is a matter of *ordre public*.<sup>120</sup>

<sup>119</sup> Ibid., at p. 201.

<sup>120</sup> Indeed, the Tribunal does ultimately make a conclusion to support this (i.e. that *ordre public* would be contravened if a patent were to unduly interfere with the *kaitiaki* relationship with a *taonga* species), but it does not do so in a clear manner in the explanatory section of the report. See *ibid.*, at pp. 201 and 210.

Third, the Tribunal would see that the Committee maintain an advisory role, but allow that it advise the Commissioner as it sees fit (not just when requested) and that it be able to prepare guidelines and protocols.<sup>121</sup> This recommendation again appears to be unnecessary; the Committee would be able to regulate its own operation,<sup>122</sup> meaning that there is nothing to prevent it from advising the Commissioner at its own accord, or to develop guidelines and protocols.

Fourth, the Commissioner should be required to approach the Committee when an application raises “Māori issues”, rather than it being optional.<sup>123</sup> What exactly would constitute “Māori issues” was not clarified. It is unclear whether the Tribunal meant the term to refer to, or be broader than, the outlined responsibility of the Committee, i.e. that which is derived from *mātauranga Māori* or indigenous (*taonga*) fauna and flora. The failure of the Tribunal to give further guidance as to what a “Māori issue” may be is wholly unhelpful, particularly seeing as it recommended along with this a compulsory action from the Commissioner. Such a strong right given to the Committee should be accompanied by a very clear mandate to the Commissioner. The author here recommends that “Māori issues” be taken as including only that related to the *kaitiaki* relationship for the same reasons as why “Māori values” should be so limited, discussed above.

Fifth, the Commissioner or his or her representative should sit jointly with the chairperson of the Committee to increase the expertise of the former.<sup>124</sup>

To go together with the Advisory Committee, the Tribunal further suggested creating a voluntary registration of *kaitiaki* interests (both in relation to *taonga* species and to *mātauranga Māori* in relation to such, which could also be used for applications for bioprospecting and GM).<sup>125</sup> It was viewed that the registration system would allow *kaitiaki* to give a clear indication of their interest and to demonstrate their proactive commitment to their responsibilities. It would also give potential third-party users fair warning of the need to engage in consultations with the *kaitiaki*, which would provide the users with more certainty and transparency. Furthermore, it would provide patent examiners with easily accessible information on prior art to assess novelty and the inventive step.<sup>126</sup>

Finally, the Tribunal recommended that it be a requirement that patent applications disclose whether any *mātauranga Māori* or *taonga* species contributed towards the alleged invention.<sup>127</sup> More specifically, applicants should have to disclose: (1) “the source and country of origin of any genetic or biological resource that contributed in any material way to the invention”; and (2) “*mātauranga Māori* that was used in the course of research, including traditional knowledge that is not integral to the invention but that prompted the inventor to take the course of research that led to the relevant patent application.”<sup>128</sup> Balancing relevant interests should take place before the grant of a patent, as not doing so places the burden on the objector. The disclosure requirement was stated to be necessary for such an early balance to take place. It would assist the patent examiners in finding prior art and assessing novelty and the inventive step, and

<sup>121</sup> Ibid., at p. 201.

<sup>122</sup> Patents Bill (As Reported from the Commerce Committee) 2010 (NZ), cl. 278. This is the same in the Trade Marks Act 2002 (NZ), s. 180.

<sup>123</sup> Wai 262, supra note 5, at p. 201.

<sup>124</sup> Ibid.

<sup>125</sup> Discussed in *ibid.*, at pp. 202-203 and 207.

<sup>126</sup> NZ MED, *Review of the Patents Act 1953*, supra note 45, at para. 109; and NZ MED, *Review of the Plant Variety Rights Act 1987*, supra note 65, at para. 106.

<sup>127</sup> Discussed at Wai 262, supra note 5, at pp. 203-205.

<sup>128</sup> Ibid., at p. 204.

would alert the *kaitiaki* and the Māori Patents Advisory Committee, possibly resulting in consultations and an agreement on ABS. The failure to fulfil this requirement should not automatically result in refusal of a patent application or revocation of a patent, as this would be “draconian” and could have a chilling effect on innovation.<sup>129</sup> The Tribunal recommended that it be up to the discretion of the Commissioner with the chairperson of the Advisory Committee to decide what the sanction would be. In some situations no repercussions would be justifiable, such as when the non-compliance has little effect on the relevant *kaitiaki* relationship or when the parties have subsequently come to agreement. However, in other cases, refusal to grant or revocation of a patent may be a valid consequence.

Importantly, the Tribunal did not find it necessary to require PIC and ABS for the grant of a patent.<sup>130</sup> It was stated that this was not justified (which is consistent with its finding for bioprospecting) and, in any case, PIC and ABS would evolve naturally from the process that applicants would go through. For example, when an application is held up by the Advisory Committee or the Commissioner recommends that an applicant consult with the relevant *kaitiaki*. This is conceivably correct. When applicants realise that patents will not be granted because of pre-existing *mātauranga Māori* or issues of Māori values regarding the use of *taonga* species, industry will slowly adjust to take into account Māori interests. The patenting process is expensive, such that most applicants would want to clear all hurdles before entering the system. Moreover, many users of Māori TK understand the desire for benefit-sharing, as TK is something the Māori actually developed. This means that most would not balk at the opportunity to develop PIC and ABS agreements, towards which the development of a register of interests would be of assistance. However, one must concede that applicants of alleged inventions derived from *taonga* species (as compared to *mātauranga Māori*) are unlikely to be as forthcoming, as many third parties do not appreciate *te ao Māori* and its spiritual values, and do not believe that the Māori should have rights to species that they did not create or develop.

#### 4.3.4 Plant Variety Rights Law

Existing PVR law was found not to take into account the interests of *kaitiaki*. The legislation in New Zealand controlling PVRs was enacted in 1987. Though it was amended in 1990 and 1994, it continues to be under review, the Ministry of Economic Development (MED) having released a discussion paper in 2002 and a Draft Amendment Bill for consultation in 2005.<sup>131</sup> Of the various changes proposed in the Draft Bill, the Tribunal supported the two potential changes that are relevant to the Wai 262 claim.<sup>132</sup>

Firstly, that “the Commissioner *must not* approve a proposed denomination if the Commissioner considers that its use or approval would be likely to offend a significant section of the community, including Māori.”<sup>133</sup> Under the current Act, prior to grant,

<sup>129</sup> The consequences of non-compliance are discussed in *ibid.*, at pp. 205-206.

<sup>130</sup> *Ibid.*, at p. 205. Similarly, in its review of the current Patents Act 1953, the Ministry of Economic Development stated that questions of ABS would ideally be managed by the parties concerned and not be a matter of legislation, though it acknowledged that this may either not occur or occur inequitable in the absence of legislation; NZ MED, *Review of the Patents Act 1953*, *supra* note 45, at para. 96.

<sup>131</sup> See, respectively, NZ MED, *Review of the Plant Variety Rights Act 1987*, *supra* note 65; and Plant Variety Rights Amendment Bill, Draft for Consultation, 2005 (NZ).

<sup>132</sup> Wai 262, *supra* note 5, at p. 206.

<sup>133</sup> Plant Variety Rights Amendment Bill, Draft for Consultation, 2005 (NZ), cl. 4 (emphasis added).

anyone can oppose the choice of name for a plant variety for which registration of right is sought.<sup>134</sup> This means that Māori could object to the use of Māori names for registered plant varieties.<sup>135</sup> Generally, this approach is consistent with the existing mechanism in the Trade Marks Act 2002 (which created a Māori Trade Marks Advisory Committee)<sup>136</sup> and is not inconsistent with that proposed in the Patents Bill 2008. The recommendation would also not be incompatible with New Zealand's international obligations under the International Convention for the Protection of New Varieties of Plants (UPOV 1991).<sup>137</sup> As with the Trade Marks Act, the recommended wording is an absolute ground for refusal. However, there is no proposal to form an advisory committee to assist the Commissioner of Plant Varieties in making the decision of whether it would be likely to offend the Māori. Why this is so is not clear, but may be due to the relatively small number and low economic importance of PVRs compared to trade marks and patents. The Wai 262 report recommended that the Māori Patents Advisory Committee should support the Commissioner to this end.<sup>138</sup>

Connected to this, the Tribunal recommended that the Commissioner should have a "power to refuse" a PVR on the basis that it would affect a *kaitiaki* relationship with a *taonga* species.<sup>139</sup> The Advisory Committee would also support the Commissioner for this purpose. It is not clear if the Tribunal meant that the Commissioner should also have the power to deregister existing PVRs via this ground. This is unlikely given the non-retroactivity that the Wai 262 report generally took, such as with knowledge that has entered the public domain and other IPRs already granted, unless use is offensive. Logically, it should allow for the de-registration of PVRs granted after the proposed change in law would come into place. It is likely that this recommendation is not consistent with New Zealand's international obligations. Unlike patent law under the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement),<sup>140</sup> which allows States much discretion in deciding on whether something is patentable and on exceptions to patentability, UPOV 1991 offers very little freedom to its Members in deciding on when grants can or cannot be made. PVRs cannot be refused on cultural grounds, such as that it would be offensive to the Māori.<sup>141</sup> Article 5 of UPOV states that breeder's rights "shall be granted" when a variety is new, distinct, uniform and stable, and that the grant cannot be subject to any "further or different conditions", other than formalities. Furthermore, Articles 21 and 22, which specify when a Member may nullify or cancel rights, outline an exclusive list (not inclusive of

<sup>134</sup> Plant Variety Act 1987 (NZ), s. 6(1).

<sup>135</sup> NZ MED, *Review of the Plant Variety Rights Act 1987*, supra note 65, at para. 116.

<sup>136</sup> Trade Marks Act 2002 (NZ), s. 178. The history of the establishment of the Committee is described in IPONZ Trade Marks Practice Guidelines (26 January 2010), chpt. 16.2. The sections of the Act relevant to Indigenous cultural property are also explained in Susy Frankel, 'Third-Party Trade Marks as a Violation of Indigenous Cultural Property: A New Statutory Safeguard' (2005) *Journal of World Intellectual Property*, 8, pp. 83-98; and Owen Morgan, 'Protecting Indigenous Signs and Trade Marks - The New Zealand Experiment' (2004) *Intellectual Property Quarterly*, 1, pp. 58-84.

<sup>137</sup> International Convention for the Protection of New Varieties of Plants (UPOV 1991) (adopted 2 December 1961), as revised at Geneva (10 November 1972, 23 October 1978 and 19 March 1991), Article 20(2), of which New Zealand is a Member, has within it a *non-exclusive* list of "characteristics of denominations", including that that they "must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder."

<sup>138</sup> Wai 262, supra note 5, at p. 206.

<sup>139</sup> Ibid.

<sup>140</sup> WTO, Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299; 33 ILM 1197 (adopted on 15 April 1994, entered into force 1 January 1995).

<sup>141</sup> NZ MED, *Review of the Plant Variety Rights Act 1987*, supra note 65, at para. 118.

anything under which a cultural exception could be made) and specifically state that nullification and cancellation cannot be based on any other grounds.<sup>142</sup>

The second recommendation made in the Draft Bill that the Tribunal approved was the proposed change that would seek to make discovered varieties unable to obtain PVRs.<sup>143</sup> The Bill would essentially make clear that “there must be a degree of human input into the development of a variety”.<sup>144</sup> Currently, the definition of “owner” is the person who “bred or discovered” a variety.<sup>145</sup> The Draft Bill recommends deleting the term “discovered” from this definition.<sup>146</sup> This would mean that plants already known to the Māori would not qualify for PVRs and is, thus, a positive development. Unfortunately, this clause is non-retroactive, meaning that existing PVRs over discovered *taonga* species would remain.

Under the current New Zealand Act, a variety is “new” if there has “been no sale of that variety with the agreement of any relevant owner of that variety”, either (i) in New Zealand, for more than 12 months before the date of application ; or (ii) overseas, for more than six years before that date in the case of a woody plant, or for more than four years for every other case. This means that varieties need not necessarily be developed.<sup>147</sup> This is in accordance with UPOV 1991, almost word-for-word, and no changes to it were recommended in the Draft Bill.<sup>148</sup> As the UPOV states that varieties “shall be deemed new” if the specified requirements are met, a prerequisite that the variety be not be “discovered”, as recommended in the Draft Bill and approved of by the Tribunal, could be contrary to New Zealand’s international obligations.

Then again, perhaps the contradiction is more complex than this. The current Act, UPOV 1991 and the Draft Bill require that varieties deemed “new” according to the above are granted rights. The changes recommended in the Draft Bill only change the meaning of the “owner”, who would only be someone who bred, but did not discover, a variety. This would create an internal inconsistency. A variety could perceivably be “new” (though discovered and not bred) and rights would have to be granted, but there would be no owner.

In its review of the 1987 Act, the New Zealand MED noted a few ways in which the Act could be amended to better acknowledge Māori interests, while continuing to comply with international obligations. These were: Firstly, to consult with Māori when deciding on applications for varieties derived from native varieties. Given the limitations in the UPOV 1991 of when Members can reject applications, the usefulness of such consultation would be of limited success. Secondly, to seek Māori advice as to whether the variety applied for is “new” or “distinct”. Such a mechanism or policy could be valuable, as these are standards that UPOV requires, but would be limited by the definitions of “new” and “distinct”. Thirdly, the MED suggested explicitly stating

<sup>142</sup> UPOV 1991, Articles 21(2) and 22(2).

<sup>143</sup> Plant Variety Rights Amendment Bill, Draft for Consultation, 2005 (NZ), cls 3(2) and 5. Currently, under the Plant Varieties Act 1987, s. 2, the definition of “variety” is a “cultivated variety”, meaning that they need only be grown or raised, but not necessarily developed.

<sup>144</sup> Plant Variety Rights Amendment Bill, Draft for Consultation, 2005 (NZ), explanatory note, at p. 1.

<sup>145</sup> Plant Variety Act 1987 (NZ), s. 2.

<sup>146</sup> Plant Variety Rights Amendment Bill, Draft for Consultation, 2005 (NZ), cl. 3(2). Plant Variety Act 1987 (NZ), s. 11 for varieties “bred or discovered” by two or more people would also have the term “discovered” removed (cl. 5).

<sup>147</sup> Plant Variety Act 1987 (NZ), s. 2.

<sup>148</sup> UPOV 1991, Article 6(1), which requires that a variety “shall be deemed to be new” if “propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety”, within the territory of the Contracting Party more than one year before application, or in another territory more than four years before application, or six years in the case of tress or vines.

that Māori have standing to make objections under the grounds already in the Act. Currently, anyone may object to applications or grants for varieties which they consider have been made on behalf of someone who is not the real owner,<sup>149</sup> which could allow for Māori to object to applications and grants where the variety was discovered on Māori-owned land.<sup>150</sup> Finally, objection can be made on the ground that the variety is not new or distinct,<sup>151</sup> which could allow for the objection of existing native plant varieties or non-distinct varieties thereof.

It was acknowledged by the Tribunal that there would be nothing to stop *taonga* species gaining PVRs overseas, which is something already occurring.<sup>152</sup> However, the Tribunal noted that this would probably not always be the case, as the international momentum to internationalise IPRs and the protection of indigenous interests will likely “crystallise into an enforceable international legal framework”.<sup>153</sup> Arguably, the Tribunal was overly optimistic in this statement. The international community has been notoriously slow in developing laws for the interests of indigenous peoples. For example, the Declaration on the Rights of Indigenous Peoples took over 20 years to develop and it is not even binding. Similarly, though indigenous interests in their TK and TCE have been on WIPO’s radar for several decades, no agreement has been reached and there is no sign that this will happen.<sup>154</sup> States are particularly wary of entering binding agreements. Though it must be said that some success has been had in the form of the Convention on Biodiversity (CBD) and the related Nagoya Protocol.<sup>155</sup>

#### 4.3.5 Locating the Relevant *Kaitiaki*: A Local Approach?

In the Wai 262 report, the Tribunal noted that it is more difficult to find the *kaitiaki* of *taonga* species than it is for *taonga* works, because the species were not created by the *kaitiaki*, many species are cross-territorial (both in the intra-national and international sense), and many communities may have their own *kaitiaki* relationship with a species and different *mātauranga Māori* over it.<sup>156</sup> The Tribunal recommended that the geographical location where the *taonga* species is found should indicate the first port of call for locating any *kaitiaki*. In other words, one should approach the local *iwi* or *hapū* whose land the biological resource is located on. Furthermore, the proposal to register *kaitiaki* interests (as mentioned above, section 4.3.3) would facilitate the finding of any relevant *kaitiaki*.<sup>157</sup> The Tribunal stated that potentially conflicting or overlapping interests would not be a problem and would only be addressed if a dispute were to arise over the particular *taonga* species or *mātauranga Māori*. If such a dispute were to become reality, the proposed Patents/PVRs Advisory Committee would assist in

<sup>149</sup> Plant Variety Act 1987 (NZ), ss 6(2) and 15(1).

<sup>150</sup> NZ MED, *Review of the Plant Variety Rights Act 1987*, supra note 65, at para. 119

<sup>151</sup> Plant Variety Act 1987 (NZ), ss 6(3) and 15(2).

<sup>152</sup> Wai 262, supra note 5, at p. 206.

<sup>153</sup> Ibid.

<sup>154</sup> Christoph Antons, ‘International Trade in Indigenous Cultural Heritage: A Perspective on the Intellectual Property Side of the Debate’, in Christoph B. Graber, Karolina Kuprecht and Jessica C. Lai (eds), *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues*, Cheltenham, UK: Edward Elgar, 2012 (forthcoming).

<sup>155</sup> New Zealand is a party to the CBD, but has yet to sign the Nagoya protocol. Rio Convention on Biological Diversity, 1760 UNTS 79; 31 ILM 818 (opened for signature 5 June 1992, entered into force 29 December 1993); and Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (UN Doc. UNEP/CBD/COP/DEC/X/1) (adopted on 29 October 2010).

<sup>156</sup> Wai 262, supra note 5, at p. 207.

<sup>157</sup> Ibid.



making any decisions. The Committee would also be expected to develop guidelines for potential users of *taonga* species (or genetic or biological resources therefrom) and *mātauranga Māori* as to how to ethically consult and negotiate with *kaitiaki*.

In a sense, it is a logical first step to approach the local *iwi* or *hapū*. However, one could argue that it could end up being an inefficient step. Because there can be many *kaitiaki*, across many different *iwi*, and *taonga* species and *mātauranga Māori* that span across traditional tribal borders,<sup>158</sup> it would be more sensible if potential users could approach a single national body, such that they would only have to enter one set of negotiations. In order to make it desirable for potential users to consult with *kaitiaki*, the process should be as streamlined and as legally certain as possible, which favours the formation of a single national body. There is also strength and authority for the Māori in having singular unified representation. Moreover, a single national body would likely have governmental funding, which would ensure that adequate legal (and other required knowledge) is at hand. Comparatively, individual *iwi* and *hapū* may not have the resources and expertise to properly participate in negotiations, even if third parties seek them out for consultation, PIC and ABS. As Aroha Mead has pointed out, indigenous peoples went from an era of being considered primitive to being “catapulted into commodifying [their] biodiversity and [their] knowledge of biodiversity at local, national and international levels all at once”, meaning that communities have little experience compared to multinational corporations and others seeking their knowledge.<sup>159</sup> In some cases, communities are not able to make informed decisions as there is no “level playing field”.<sup>160</sup>

Indeed, the Tribunal acknowledged that local *kaitiaki* cannot represent the national interest, stating that “[s]uch issues may be taken up in the future by a national body representing the interests of *kaitiaki* throughout the country. But a national body representing *kaitiaki* cannot be created from the outside. *It will be for Māori themselves to develop such a body as they see fit.*”<sup>161</sup> This final statement by the Tribunal is interesting because it contradicts the finding for *taonga*-derived works, *taonga* works and their *mātauranga Māori*, for which the development of a national commission was recommended. Why exactly it is for the “Māori themselves” to develop a commission for *taonga* species and their related *mātauranga Māori* was not elaborated upon. This distinction does not seem logical to the author here. A commission for *taonga* species and their related *mātauranga Māori* would be helpful for the areas of bioprospecting and GM applications, and patent and PVR law. Potential users could approach it to be directed to the appropriate *kaitiaki* or *iwi*, to consult and maybe create PIC and ABS agreements. Moreover, a national commission would create more legal certainty for users of *taonga* species and related *mātauranga Māori*. For example, appropriate agreements that arise from consultations orchestrated through the national commission would be a clear indication of non-breach of *tikanga Māori* or the *kaitiaki relationship*. Comparatively, agreements on PIC and ABS at the local level do not address the issue of conflicting or overlapping *kaitiaki* interests, and indicate little of the national perspective. This commission could also oversee the register of *kaitiaki* interests. Moreover, there is no reason why the function of the recommended Patents/PVR

<sup>158</sup> This is noted as a general problem of the claim, in Dengate-Thrush, *supra* note 2, at p. 309. See also Roberts, *supra* note 66, at pp. 146-148, who makes a case study illustrating the difficulties that researchers can have in trying to navigate between Māori individuals, *hapū*, *iwi* and organisations, which can ultimately “frustrate efforts on both sides to engage in meaningful consultation.”

<sup>159</sup> Mead, ‘Indigenous Rights to Land and Biological Resources’, *supra* note 61, at p. 4.

<sup>160</sup> *Ibid.*, at p. 10.

<sup>161</sup> Wai 262, *supra* note 5, at p. 207 (emphasis added).

Advisory Committee could not also be under its purview. This would be analogous to the commission recommended for *taonga* works, for which it was also suggested that it take over the duties of the Māori Trade Marks Advisory Committee.

#### 4.3.6 The Place of Voluntary Codes and Guidelines

The Wai 262 report is predominantly about laws and how they should be adjusted or developed to better take into account the *kaitiaki* interest as guaranteed under Article 2 of the Treaty of Waitangi. However, the Tribunal expressed that changes in law are not the complete answer. To really change the way in which research is conducted, one must consider guidelines and codes of conduct.<sup>162</sup> Hence, the *kaitiaki* relationship and practices relating to consultation, PIC, ABS and collaboration should be protected through such guidelines and codes, produced with Māori input. This is in all three stages of the research and development process of bioprospecting, applications for genetic research and IPRs. Thus, it would not only be up to governmental agencies or bodies to create such guidelines or codes, but also up to industry itself.

The Tribunal is correct in its statement that industry mind-set must be adjusted. However, this may require some incentive, as industry will not expend resources unless it is ultimately to its benefit. Moreover, voluntary codes of conduct by themselves have limited value because they lack enforceability. Thus, the development of such codes must be viewed as just one clog of the mechanism recommended by the Tribunal. Support in legislation would act as an incentive for industry to get it right from the beginning – both in developing a code and in following it – so as not to lose out later when applying for the right to research or for an IPR.

### 5. IS TRIPS A CONCERN?

The TRIPS Agreement<sup>163</sup> was concluded during the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), through which the World Trade Organization (WTO) was also formed. TRIPS is considered to be the most important international agreement on IP, incorporating into it much substantive law from previous international agreements, such as the Berne Convention and Paris Convention,<sup>164</sup> and bringing them within the realm of the WTO dispute settlement process. New Zealand was a member of the GATT prior to the formation of the WTO and so partook in the negotiations. However, the Māori have complained that consultation during this process was inadequate.<sup>165</sup> Because TRIPS binds New Zealand to laws that could impact on their *tino rangatiratanga* in *mātauranga Māori*, *taonga* works and *taonga* species, the

<sup>162</sup> Ibid.

<sup>163</sup> See TRIPS Agreement, *supra* note 140.

<sup>164</sup> WIPO, Berne Convention for the Protection of Literary and Artistic Works (1886) (adopted on 9 September 1886), as revised at Paris (24 July 1971) and as amended on 28 September 1979; and WIPO, Paris Convention for the Protection of Industrial Property, 828 UNTS 303 (adopted on 20 March 1883, entered into force 16 April 1970), as revised at Stockholm (14 July 1967).

<sup>165</sup> See, for example, Mead, 'Indigenous Rights to Land and Biological Resources', *supra* note 61, at pp. 9-10; and Aroha Mead, 'Delivering Good Services to the Public without Compromising the Cultural and Intellectual Property of Indigenous Peoples', *The Public Service: Delivering Good Services to the Public*, International Ombudsmen Institute and New Zealand Institute of Public Administration (Wellington, New Zealand, 8 October 1993), at p. 2, collected in Aroha Mead, *Nga Tikanga, Nga Taonga. Cultural and Intellectual Property: The Rights of Indigenous Peoples*, Auckland, New Zealand: International Research Institute for Māori and Indigenous Education, 1994, pp. 24-33.

Māori believe that it was the Crown's duty under the Treaty to consult with them.<sup>166</sup> Seeing as New Zealand was already a Contracting Party to both the Berne and Paris Conventions (and several other relevant international treaties) and already had relatively strong IP systems in place, the impact that the accession to TRIPS had on New Zealand law is debatable and was arguably minimal, particularly with respect to the subject matter of the Wai 262 claim.<sup>167</sup>

Nevertheless, in the Wai 262 claim, the concern was raised that TRIPS prevented the Crown from providing protection for the *kaitiaki* interest in *mātauranga*, *taonga* works and *taonga* species. However, as noted by the Tribunal (and conceded by the Crown),<sup>168</sup> TRIPS consists of minimum standards. This means that New Zealand can, in theory, create stronger and/or additional *sui generis* rights other than those envisioned in TRIPS, including providing mechanisms to protect the *kaitiaki* interest in *mātauranga* Māori, *taonga* works and *taonga* species. There need only be the will to do so.<sup>169</sup> Moreover, the government has previously indicated willingness to develop country- or region-specific approaches for the protection of traditional knowledge.<sup>170</sup> However, though TRIPS only contains minimum standards as to the rights to and from protection, it also contains some ceilings with respect to the exceptions to those rights. For all three of the main areas of IP law (namely, trade mark, copyright and patent law), TRIPS outlines when a Member State can make an exception to the right to protection and rights entailed thereby.<sup>171</sup> Thus, any *sui generis* system that requires a limitation of the right to a patent, trade mark or to copyright, or the rights of such owners, must fall into one of the exceptions.

That the rights conferred by IP may be limited, and also the ability to grant those rights in the first place, is confirmed as a TRIPS Principle. It is recognised that Members may want to formulate their laws to "adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development".<sup>172</sup> TRIPS further acknowledges as a Principle that Members may need measures to prevent "the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."<sup>173</sup>

Relating to patent law, the Tribunal in the Wai 262 report only made recommendations that would affect patentability and not the rights of a patent owner. The Articles on patent law in the TRIPS Agreement are quite explicit in outlining allowable exceptions to patentability. Article 27.2 has very similar wording to that proposed in the Patents Bill and by the Tribunal in the Wai 262 report, also permitting Member States to exclude inventions, the "commercial exploitation" of which would be contrary to *ordre public* or morality. This specifically, but not exclusively, includes "to protect human, animal or plant life or health or to avoid serious prejudice to the environment". The recommendations made through the Bill and the Tribunal vary from TRIPS, as they stipulate that the Māori should be able to raise complaints through the

<sup>166</sup> Solomon, 'IPRs and Indigenous Peoples Rights and Obligations', *supra* note 8; and Smith, 'A Comment', *supra* note 15, at p. 39. The impact of TRIPS and multilateral agreements on Māori TK and TCEs is discussed thoroughly in Lord, *supra* note 44, at pp. 37-43.

<sup>167</sup> Dengate-Thrush, *supra* note 2, at pp. 306-307.

<sup>168</sup> Wai 262, *supra* note 5, at pp. 50-51 and 72-74.

<sup>169</sup> *Ibid.*, at p. 74.

<sup>170</sup> NZ MED, *Review of the Plant Variety Rights Act 1987*, *supra* note 65, at para. 105.

<sup>171</sup> TRIPS Agreement, Articles 13 (copyright), 26.2 (trade marks), 27.2 and 27.3 (patents).

<sup>172</sup> TRIPS Agreement, Article 8.1.

<sup>173</sup> TRIPS Agreement, Article 8.2.

grounds, though they are a minority. Comparatively, TRIPS does not indicate whose *ordre public* or morality is to be assessed

The concepts of *ordre public* and morality are by no means well-defined. The TRIPS Agreement itself neither offers any assistance towards the meanings thereof, nor does it specifically direct to whom in society they are targeted. The Patents Bill is equally unhelpful. *Ordre public* tends to refer to matters that threaten public security and social structures, and that which can cause public disorder (such as riots or crime).<sup>174</sup> For the purposes of GATT interpretation, the WTO Appellate Body stated that it “refers to the preservation of the fundamental interests of a society, as reflected in public policy and law”.<sup>175</sup> Comparatively, morality is related to the values of a society, is closely tied into culture and is dependent on locality.<sup>176</sup> Under GATT, it has been defined by the Appellate Body as “denot[ing] standards of right and wrong conduct maintained by or on behalf of a community or nation”.<sup>177</sup> It is not clear, whether the role of the proposed commission would fall under the auspice of “*ordre public*” or “morality”, or both. Nevertheless, it could hardly be argued that protecting the *kaitiaki* relationship guaranteed in a constitutional document of New Zealand, related to a matter of *tino rangatiratanga* or governance, is not a matter of *ordre public*.

Article 27.3(b) provides that Members can also exclude “plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes”. But, Members must provide protection for plant varieties either via patents or a *sui generis* system, which New Zealand does under its laws on PVRs. Given that Article 27.3(b) specifically allows for the exclusion of all plants and animals, there does not appear to be any reason why it cannot merely exclude some plants and animals, according to the protection of the *kaitiaki* relationship. Thus, on the unlikely possibility that the recommendations would not fall under the exception in Article 27.2, the aspects regarding *taonga* species (but not the related *mātauranga Māori*) could come under Article 27.3(b).

As discussed above, the Tribunal also recommended that failure to disclose whether any *mātauranga Māori* or *taonga* species contributed to the invention could result in application rejection or patent revocation. It is not clear whether it would be TRIPS compliant to deny patentability purely on failure to disclose (presuming this failure does not affect novelty or obviousness). After all, TRIPS is explicit about the allowed limitations to patentability, and such failure to disclose is not included. On the other hand, it is possible that rejecting patentability on the ground of failure to disclose could be justified under *ordre public*, in certain circumstances, as gross failure could affect the *kaitiaki* relationship.

<sup>174</sup> Daniel Gervais, ‘Patents: Order Public and Morality’ (2004), at pp. 375 and 379, available online at [http://www.iprsonline.org/unctadictsd/docs/RB2.5\\_Patents\\_2.5.3\\_update.pdf](http://www.iprsonline.org/unctadictsd/docs/RB2.5_Patents_2.5.3_update.pdf).

<sup>175</sup> WTO, Appellate Body, *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R, adopted 20 April 2005, at para. 6.467.

<sup>176</sup> Gervais, *supra* note 174, at pp. 375 and 379.

<sup>177</sup> WTO, Appellate Body, *supra* note 175, at para. 6.465.

## 6. CONCLUDING THOUGHTS

Like the UN Declaration on the Rights of Indigenous Peoples, which New Zealand adopted in April 2010,<sup>178</sup> the Wai 262 report is not binding. Nevertheless, also like the Declaration, it has huge symbolic and political force. At the time of writing, the New Zealand Government was still considering the report.<sup>179</sup> Given the importance of the issues involved and the length of time taken for its delivery, much was expected from it.<sup>180</sup> Opinions on the report have been mixed, with some viewing it as potentially conceding to the Māori too much,<sup>181</sup> or contradicting New Zealand democratic traditions.<sup>182</sup> Whereas others (particularly the claimants) have declared their dissatisfaction at the half-way and precautionary nature of the recommendations,<sup>183</sup> stating that the participatory character of many of the recommendations (rather than complete control) do not necessarily mean more power.

The author here does not agree with either view, but is instead optimistic with the compromise and balance developed in the report, which reflects the very nature of the Treaty of Waitangi. As pointed out throughout the paper, the report on occasion lacked in clarity and preciseness. However, this is something that can be worked on. Of particular importance will be ensuring that what the government ultimately adopts is coherent with the Patents Bill, which may require re-drafting the Bill. It is also important that the legislator keep New Zealand's international obligations in mind, this is particularly with respect to the UPOV for plant variety rights law and TRIPS for

<sup>178</sup> UN, Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007) GA Res. 61/295 (UN Doc. A/61/L.67 and Add.1) (adopted on 13 September 2007); and Pita Sharples (Māori Party Co-Leader), 'Supporting UN Declaration Restores NZ's Mana', *Press Release* (20 April 2010), available online at <http://www.beehive.govt.nz/release/supporting+un+declaration+restores+nz039s+mana>. Addressing whether the Wai 262 report is consistent with the UN Declaration is outside the confines of the purposes of this paper, but is well-worth its own discourse.

<sup>179</sup> Belinda McCammon, 'Govt Considers Wai 262 Claims Report', *stuff.co.nz National* (2 July 2011), available at <http://www.stuff.co.nz/national/politics/5224263/Govt-considers-Wai-262-claims-report>; and Kate Chapman and Belinda McCammon, 'Govt Take Time to Considering Wai 262 Report', *stuff.co.nz National* (4 July 2011), available at <http://www.stuff.co.nz/national/politics/5228332/Govt-to-take-time-considering-Wai-262-report>.

<sup>180</sup> See, for example, Lord, *supra* note 44, at pp. 41-42.

<sup>181</sup> 'Editorial: Caution the Right Approach to Report', *The Dominion Post* (7 July 2011), available online at <http://www.stuff.co.nz/dominion-post/comment/5245734/Editorial-Caution-the-right-approach-to-report>. For an extreme view, see Muriel Newman, 'Wai 262 Empowers Māori Elite' (2011) *New Zealand Centre for Political Research*, 284, available at <http://www.nzcp.com/Weekly284.pdf>. Newman's article borders on being propaganda-like and racist in nature. In the least, it is dangerously provocative. It is clear that she either did not read the full report before writing her piece, or did not grasp the intention behind the recommendations of the Waitangi Tribunal. Yet, states that the claimants have a "race-based lust for power and control" (at p. 1), that non-Māori "are being increasingly marginalised by the cunning strategies of a greedy tribal elite" (at p. 1); and are treating non-Māori as fools by claiming spirituality that does not exist (at p. 2). Moreover, she places fire under fears already existent in mainstream New Zealand that any rights given to Māori will create a "country permanently divided by race, with a Maori aristocracy based on privilege." Māori lawyer Joshua Hitchcock stated that her opinion was an "utter disgrace" and "nothing more than an attempt to spread fear through the Pakeha population that [the Wai 262] Report will be the catalyst for the takeover of New Zealand by a Maori Oligarchy"; Joshua Hitchcock, 'Wai 262: Initial Thoughts', *Māori Law and Politics* (2 July 2011), available at <http://roiamaori.wordpress.com/2011/07/02/wai-262-initial-thoughts/>.

<sup>182</sup> Such as Act Party Leader Don Brash; Tova O'Brien, 'Iwi Shouldn't Get Special Treatment with Wai 262 – Brash', 3 *News* (2 July 2011), available at <http://www.3news.co.nz/Iwi-shouldnt-get-special-treatment-with-Wai-262---Brash/tabid/423/articleID/217335/Default.aspx>.

<sup>183</sup> Rahui Katene, 'Māori Should Dare to Take the Leap of Faith in Planning for Survival', *The Dominion Post* (12 July 2011), available online at <http://www.stuff.co.nz/dominion-post/comment/5269828/Maori-should-dare-to-take-the-leap-of-faith-in-planning-for-survival>.

patent law. Of particular concern is the reluctance to create a national body to oversee all the mechanisms recommended.

Nevertheless, a positive note should be made of the report generally seeking to balance the interests of all concerned parties, while at the same time taking into account the modern context that the Treaty guarantees must be interpreted in and the ultimate goal of advancing New Zealand socially and economically; a by no means easy feat. The Māori (and many indigenous peoples) have often argued that they do not want “ownership” over their cultural and intellectual property, but rather a real voice in decision-making<sup>184</sup> and the ability to exercise their roles and *mana* as *kaitiaki*. It has been difficult for colonised states to perceive of how to accommodate the idea of stewardship without also bestowing ownership. The “half-way nature” of stewardship has made states and opponents think and act as if there are either no rights or ownership, which has made states tend towards the former. Through embracing *kaitiakitanga* as recognised through *tinio rangatiratanga* in Article 2 of the Treaty of Waitangi and recommending either an advisory or shared decision-making role for the purposes of bioprospecting, research in GM, and in the patent- and PVR-grant processes, the Tribunal has introduced the recognition of a non-typically-Western concept into the realm of property law (both real and intellectual). Moreover, the core mechanism presented by the Tribunal is a *procedural approach*, which – as has been concluded by Christoph B. Graber – is the most suitable form for a solution involving the interface between the two worldviews of the Māori, on one side, and of the Western world, on the other.<sup>185</sup>

The Wai 262 report can be used as a foundational stone to build the future of New Zealand. The report shows that settling Treaty grievances does not settle the Treaty. Rather, the Treaty is part of the constitutional infrastructure of New Zealand and must be looked at as something that can and should shape the way the State moves forward. The Wai 262 report should be considered as a pebble dropped into a pond, the ripples of which wake New Zealanders up and force them to consider the place of Māori and non-Māori in New Zealand, together, and which compels them to action. It should not be something feared, but looked upon as an opportunity to build the nation as one, made up by many.

Peter Dengate-Thrush has noted that, rather than being economic, the “greatest part of the value to the claimants may well lie in a restoration of ‘mana’ said to have been lost.”<sup>186</sup> The mechanisms proposed by the Tribunal would allow for this restoration. As stated by Māori Party MP Rahui Katene, “with the receiving of this report – [now] is the time to both reaffirm our enduring spirit of commitment as well as to pave a new pathway forward to write a better history” and “[o]ur next steps are crucial in creating the partnership which truly reflects the constitutional promises made in the Treaty. Our future depends on it”.<sup>187</sup>

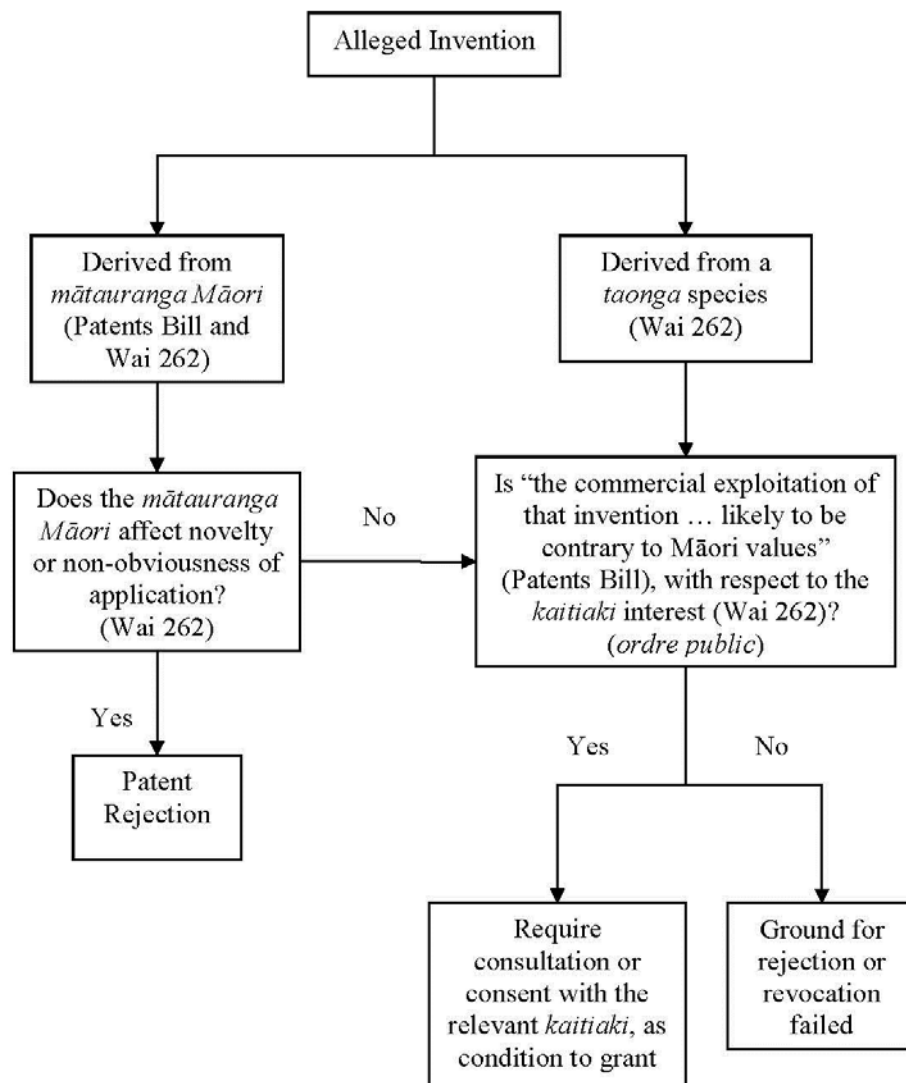
<sup>184</sup> Mead, ‘Indigenous Rights to Land and Biological Resources’, *supra* note 61, at p. 1.

<sup>185</sup> Christoph B. Graber, ‘Institutionalization of Creativity in Traditional Societies and in International Trade Law’, in Shubha Ghosh (ed.), *Creativity, Law and Entrepreneurship*, Cheltenham, UK: Edward Elgar, 2010, pp. 234-263, at pp. 251-252; and Christoph B. Graber, ‘Stimulating Trade and Development of Indigenous Cultural Heritage by Means of International Law: Issues of Legitimacy and Method’, Christoph B. Graber, Karolina Kuprecht and Jessica C. Lai (eds), *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues*, Cheltenham, UK: Edward Elgar, 2012 (forthcoming).

<sup>186</sup> Dengate-Thrush, *supra* note 2, at p. 309. See also Lord, *supra* note 44, at p. 35, who stated that having *tinio rangatiratanga* in their traditional cultural heritage is about restoring *mana*, cultural integrity and dignity, and strengthening cultural identity.

<sup>187</sup> Rahui Katene (Māori Party MP), ‘Wai 262’, *Māori Party Speech* (2 July 2011), available online at <http://www.scoop.co.nz/stories/PA1107/S00024/speech-wai-262-rahui-katene.htm>.

## APPENDIX: CREATING COHERENCY BETWEEN WAI 262 AND THE PATENTS BILL 2008



## GLOSSARY

Ahi kā	The “long burning fire of occupation” (Hirini M. Mead, <i>Landmarks, Bridges and Visions: Aspects of Māori Culture</i> , Wellington: Victoria University Press, 1997, at p. 264). Traditionally, it applied only to land, but the contemporary view is that this concept can extend beyond just land, and is about meeting one’s tribal obligations and maintaining their connections to the Māori world (T. Kāretu, ‘The Clue to Identity’ (1990) <i>New Zealand Geographic</i> , 5, pp. 112-117, at p. 112).
Atua	Gods.
Haka	Māori posture dance.
Hapū	A sub-division of <i>iwi</i> (clans within an <i>iwi</i> ). Membership is determined by genealogical descent and a <i>hapū</i> is made up of a number of <i>whānau</i> .
Heitiki	Carved figure, image, a neck ornament usually made of greenstone and carved in an abstract form of a human.
Hui	A gathering, assembly or meeting.
Iwi	These are Māori tribes, consisting of several related <i>hapū</i> (clans or descent groups).
Kaitiaki	Someone who has the <i>mana</i> to be a trustee, minder, guard, custodian, guardian or keeper over something that is <i>taonga</i> .
Kaitiakitanga	Māori stewardship or guardianship over their people lands, villages and treasures. The conservation ethic embodied in the practice of <i>Kaitiakitanga</i> is important for the sustainable management of natural and physical resources. The use, management, and control of these resources are carried out to the mutual benefit of people and resources.
Karakia	Incantations and prayers.
Kaumatua	Elders.
Kawanatanga	Governance.
Kōrero	Narrative, story, discussion or conversation.
Koru	A shape based on an unfurling fern frond, common in Māori designs and art work.
Kowhaiwhai	Māori scroll painting, painted scroll ornamentation - commonly used on meeting house rafters.
Mana	This is authority, control, influence, power, prestige, psychic force. There are three forms of <i>mana</i> : <i>mana atua</i> - God given power; <i>mana tūpuna</i> - power from ancestors; <i>mana tangata</i> - authority from personal attributes. (See Margaret Mutu, <i>Te</i>



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	<i>Whanau Moana: Nga kaupapa me nga tikanga/ Customs and Protocols - The Teachings of McCully Matiu, Auckland: Redbooks, 2003, p. 156).</i>
Manākitanga	Nurturing relationships and looking after people.
Māoritanga	A term which conceptualises “Māoriness” and encapsulates elements of traditional Māori expressions considered to be essential to Māori culture.
Marae	Sacred places, which serve both a religious and social purpose in pre-Christian Polynesian societies.
Mātauranga Māori	Māori knowledge; traditional knowledge of cultural practice; the body of knowledge originating from Māori ancestors, including the Māori world view and perspectives, Māori creativity and cultural practices.
Mauri	The life force.
Moko	Māori facial tattoo.
Mokopuna	Grandchild or descendent.
Mōteatea	Song poetry or chant.
Ngāngara (also ngārara)	insect, creepy-crawly, reptile
Ngā taonga tūturu	Objects that relate to Māori culture, history or society.
Noa	To be free of <i>Tapu</i> . The <i>tapu</i> of <i>taonga</i> sometimes needs to be removed temporarily before people can make use of them. <i>Karakia</i> are important for the removal of <i>tapu</i> from <i>taonga</i> , rendering them <i>noa</i> .
Pākehā	A name used to refer to non-Māori, usually of European decent.
Pitau	See koru.
Rangatiratanga	See Tino rangātiratanga.
Taiaha	Traditional Māori weapon.
Ta moko	The art of Māori tattooing.
Tāngata whenua	A term sometimes used by the Māori to self-identify. In its broadest sense, it means “people of the land”, so is also used to mean “indigenous people”.
Tangi	Funeral service.
Taniko	Māori weaving.
Taonga	Treasures or highly prized possessions or holdings; sacred.
Tapu	To be sacred (the opposite of <i>noa</i> ). People, objects or places can be <i>tapu</i> . All <i>taonga</i> are <i>tapu</i> .
Te ao Māori	The Māori worldview. Literally “the Māori world”.

Te ao Pākehā	The non-Māori world view.
Te reo Māori	The Māori language.
Tikanga Māori	“Māori tools of thought and understanding that help organise behaviour” (Hirini M. Mead, <i>Tikanga Māori: Living by Māori Values</i> , Wellington: Huia Publishers, 2003, at p. 12), or a “Māori way of doing things” (New Zealand Law Commission, <i>Māori Custom and Values in New Zealand Law</i> , Wellington: NZLC, 2011 at p. 17). They are subject to interpretation, there are tribal variations and there is fluidity in their application.
Tiki	See <i>heitiki</i> .
Tino rangatiratanga	Sovereignty, chieftainship, self-determination.
Tipuna (also tīpuna, tupuna, tūpuna)	Ancestors
Tohunga	Priests; experts in Māori medicine and spirituality.
Utu	This is about reciprocity in relationships and the balancing of social relationships.
Wahi tapu	Sacred places, “in the traditional, spiritual, religious, ritual, or mythological sense” (Historic Places Act 1993 (NZ)).
Waka	Māori canoe.
Whakairo iwi	Māori bone carving.
Whakairo kohatu	Māori stone carving.
Whakairo rakau	Māori wood carving.
Whakapapa	<i>Whakapapa</i> represents more than lineage and genealogy, but also connects Māori existence to the <i>atua</i> (gods), creation and all life and represents the inheritance Māori receive from descent. It encompasses the view of existence itself and the relationship between this and the natural world.
Whānau	This means extended family and includes anyone connected by blood, not matter how distantly connected.
Whanaungatanga	This is one of the most pervasive Māori values and it stresses the importance of maintaining relationships, or creating meaningful relationships with people. The nature of this kinship relationship determines people's rights, responsibilities, and obligations in relation to the use, management, and control of <i>taonga</i> of the natural world. <i>Whanaungatanga</i> determines rights and use, and responsibility to sustainably manage particular resources.

Note. There is an online Māori to English dictionary, available at <http://www.maoridictionary.co.nz/>